313 U.S. 594

FILED
MAY 8 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1032

MARLIN-ROCKWELL CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

DANA B. HELLINGS,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
A. Summary statement of matter involved	1
B. Jurisdiction	7
C. The questions presented	8
D. Reasons relied on for the allowance of the writ	9
Prayer for relief	11
Brief	13
Opinions	13
Jurisdiction	13
Facts	14
Argument	14
I. The majority necessary to entitle a union to represent all employees in a unit is an important question of statutory construction which should be settled by this Court	15
II. This Court should review the abuse of the Board's discretion in denying petitioner representation at the election	18
III. The eligibility of discharged employees to vote in a bargaining election presents an important question of Federal law which has not been, but should be, settled by this Court	21
IV. In holding that the Board's findings were supported by evidence, the decision of the Circuit Court of Appeals is probably contrary to prior decisions of this Court	24
Conclusion	28

Table of Authorities.

Cases:

The Associated Press, 1 N. L. R. B. 686, Aff. 85 F. (2d) 56, Aff. 301 U. S. 103, 57 S. Ct. 650 16

Page

Chrysler Corp. 1 N. L. R. B. 164 16
Consolidated Edison Company of New York, Inc., v. *National Labor Relations Board*, 305 U. S. 197, 229, 59 S. Ct. 206, 216-217 ..... 11, 24
Lukenbach Steamship Co., 2 N. L. R. B. 181 16
Nashville C. & St. L. Ry. v. *Railway Employees' Dept.*, 93 F. (2d) 340, 342 22
National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45-46 23
National Labor Relations Board v. *Waterman S. S. Co.*, 309 U. S. 206, 213-214, 219 22
National Labor Relations Board v. *Whittier Mills Co.*, 111 F. (2d) 474 16
New England Transportation Co., N. L. R. B. 130 16
R. C. A. Mfg. Co., Inc., 2 N. L. R. B. 159 16
Virginian Ry. v. *Federation*, 11 F. Supp. 621, Aff. 84 F. (2d) 641, Aff. 300 U. S. 515 17

Statutes:

National Labor Relations Act (49 Stat. 449, et seq., 29 U. S. C. A., § 151, et seq.):
Section 2 (3) 10
Section 7 24
Section 9 (a) 8, 9, 10, 15, 21
Section 9 (c) 10, 21
Section 10 (e) 7
Section 10 (f) 10
43 Stat. 938 (Judicial Code, § 240, 28 U. S. C. A., § 347) 8
43 Stat. 940 (28 U. S. C. A., § 350) 8
Railway Labor Act (44 Stat. 577, as amended, 45 U. S. C. A., §§ 151-163) 17

Other Authorities:

Commerce Clearing House, Inc., Labor Law Service, Pars. 4510-4520 15
First Annual Report, National Labor Relations Board, pp. 77, 89, 108 ..... 15, 23

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1032

MARLIN-ROCKWELL CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of the Marlin-Rockwell Corporation respectively shows to this Honorable Court:

A. Summary Statement of Matter Involved.

This cause arises out of alleged unfair labor practices of the petitioner in refusing to bargain collectively with International Union, United Automobile Workers of America, Local No. 338 (C. I. O.) (hereinafter referred to as the Union), and in terminating the employment of certain employees allegedly because of membership or activity in the Union.

A dispute having arisen concerning the right of the Union to represent all of petitioner's employees for purposes of collective bargaining, a consent election was held on August

21, 1937. For said election, representatives of the Union, petitioner and the National Labor Relations Board (hereinafter referred to as the Board) agreed upon the appropriate unit, and the procedure to be followed, and prepared lists of the employees who should be eligible and ineligible, respectively, to vote (R. 20, 32, 247-250).

The outcome of this election was as follows (Bd. Ex. 13, Case No. III-R-42, R. 14-15-22; Res. Ex. 2, Case No. C-967, R. 14-15, 250-252):

Total number eligible to vote	429
Total number of ballots counted	334
Total number of votes in favor of Union	202
Total number of votes against Union	129
Total number of void ballots	3

Thus, the Union, although it received a majority of the ballots counted, did not receive the affirmative designation of a majority of the employees eligible to vote. For this reason petitioner refused to recognize the Union as the representative of all its employees for purposes of collective bargaining. The Board, in the proceedings based on this consent election was evidently unwilling to hold that a majority of votes cast, when less than a majority of the employees eligible, was a sufficient designation, for in its Decision (Bd. Ex. 1-A, Case No. R-342, R. 38-47, 61) it refused to certify the Union and ordered a new election to be held.

At the election held February 24, 1938, purportedly pursuant to said Direction of the Board in said proceedings, petitioner requested permission to have a representative present, but such permission was denied (Bd. Exs. 1-B, 1-D and 1-E, Case No. R-342, R. 48-49, 52-55, 62, 74-76, 257-258). According to the Intermediate Report of the Regional Di-

rector, the result of said election was as follows (Bd. Ex. 1-F, Case No. R-342, R. 55-57, 62):

Total number eligible to vote	407
Total number of ballots counted	330
Ballots in favor of Union	175
Ballots against the Union	155
Void ballots	2
Challenged ballots	9

Petitioner duly served its Exceptions (Bd. Ex. 1-H, Case No. R-342, R. 57-59, 63) to the Regional Director's Intermediate Report of said election, objecting thereto on the grounds (1) that the number of votes reported cast for the Union did not constitute a majority of those deemed eligible to vote, (2) that various individuals not in petitioner's employ at the time of the election had been considered eligible and allowed to vote, (3) that petitioner's motion to have a representative present at said election had been denied, and (4) that the election and the Intermediate Report and the findings and recommendations therein were illegal, invalid and not binding upon petitioner. A hearing upon said Exceptions was held on April 4, 1938, at which testimony and exhibits were introduced in evidence and stenographic minutes were kept. The Trial Examiner made a written report, but petitioner notwithstanding its request (Bd. Ex. 1, Sched. "C", Case No. III-C-165, R. 160, 170-171), was denied a copy thereof (Bd. Ex. 1, Sched. "D" and "E", Case No. III-C-165, R. 160-162, 170-171) and was thereby deprived of the opportunity of examining the same and excepting thereto.

On the basis of this proceeding the Board issued a Certification of Representatives (Res. Ex. 4, Case No. C-967, R. 128-133, 258) certifying the Union as the exclusive representative of all of petitioner's employees in the unit.

On September 11, 1938, a Complaint (Bd. Ex. 1, Case No. III-C-165, R. 136-141, 170-171) was served upon petitioner charging petitioner with unfair labor practices in that it:

(a) Refused to bargain collectively with the Union as the sole duly designated representative of petitioner's eligible employees in the appropriate unit.

(b) Discriminatorily terminated the employment of ten named employees, including Francis B. Winans and Herbert S. Anderson, because of membership or activity in the Union, and

(c) Interfered with, restrained and coerced its employees in the exercise of their rights by the above acts and by other acts.

Petitioner duly served its Answer (Bd. Ex. 1, Case No. III-C-165, R. 141-162, 170-171) denying the allegations of said Complaint, and alleging that the employees named therein were discharged for valid business reasons; and on August 25, 26, 29 and 30, 1938, a hearing was held at Jamestown, N. Y., before a trial examiner duly designated by the Board. At this hearing it was expressly agreed by all parties (R. 219) that the records in all prior Board proceedings involving petitioner should constitute part of the record in this case and might be referred to and considered in connection with any brief, argument or appeal.

From this hearing resulted the Trial Examiner's Intermediate Report (R. 426-448), petitioner's exceptions thereto (R. 448-475) and finally the Board's Decision and Order (R. 475-504). By said Decision, the Board dismissed all allegations of discriminatory discharge except two, Winans and Anderson, but found petitioner guilty of the other unfair labor practices charged. The Order contained the usual cease and desist provisions and affirmatively

directed petitioner to bargain with the Union, to reinstate Winans and Anderson with back pay, and to post notices.

Petitioner duly petitioned the Circuit Court of Appeals for the Second Circuit (R. I) to review and set aside the said Decision and Order of the Board. In its answer (R. VI) to said petition the Board requested enforcement of its said Order. After oral argument and the submission of briefs by both parties, the Circuit Court of Appeals for the Second Circuit rendered its opinion (116 F. (2d) 586-589, R. 513) modifying the Board's Order in regard to posting notices and payments to public relief agencies and, as modified, affirming the said Order.

Two matters are involved herein: (1) the conduct and result of the election held by the Board on February 24, 1938, to determine whether or not the Union should represent all of petitioner's employees in the appropriate unit for purposes of collective bargaining and (2) the existence of any substantial evidence to show that the discharges of Winans and Anderson were discriminatory.

The certification (Res. Ex. 4, Case No. III-C-165, R. 128-133, 258) of the Union as such bargaining representative and the guilt of petitioner in refusing to bargain with the Union are based entirely upon the said election (R. 484, 486). In the said election the Union received a slender majority of the votes cast, but less than a majority of the employees determined by the Board to be eligible to vote (Bd. Ex. 1-F, Case No. R-342, R. 55-57, 62). An important question of statutory construction is therefore raised, namely, whether a Union which receives a majority of the votes cast, but not the affirmative vote of a majority of the employees in the appropriate unit, is entitled to act as the exclusive representative of all employees in the unit for purposes of collective bargaining, under Section 9 (a) of

the National Labor Relations Act (49 Stat. 453, 29 U. S. C. A., § 159) which provides:

> "Representatives designated or selected for the purposes of collective bargaining by a majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining * * *."

Prior to the election of February 24, 1938, petitioner duly requested permission to have a representative present at said election (Bd. Ex. 1-B and 1-D, Case No. R-342, R. 48-49, 52-54, 62, 74-76, 257-258) for the purpose of checking the identity and eligibility of persons who presented themselves to vote, of challenging those deemed ineligible and of determining whether or not said election was conducted in accordance with the Board's Direction of Election. Such permission was unconditionally refused by the Board (Bd. Ex. 1-E, Case No. R-342, R. 54-55, 62). Granting that petitioner did not have an absolute right to such representation, the question remains whether, under the facts of this case, the denial of such representation was not so arbitrary as to constitute an abuse of the Board's discretion.

The final and most important question in regard to said election concerns the eligibility of certain persons to vote therein. Under the Board's Direction of Election (Bd. Ex. 1-A, Case No. R-342, R. 38-47, 61), eligibility was based upon the petitioner's payroll of September 24, 1937—five months prior to the election. During the intervening period, petitioner's business suffered a very serious decline (see Res. Ex. 9, Case No. III-C-165, R. 166-167, 271-272), and a large reduction in the working force became necessary. During this time 174 employees were discharged by petitioner because of lack of work (Res. Ex. 4, Case No. R-342, Res. Ex. 10 and 11, Case No. III-C-165, R. 60, 65, 66-67,

167, 168-169, 273-276). These discharges were final, and there were no commitments of any kind to reemploy any of these persons at any time or under any circumstances (R. 70-73, 76-93). Nevertheless these persons were permitted to vote and 114 of them did vote in the election (Res. Ex. 4, Case No. R-342, R. 60, 65). Since the final vote, according to the Board's figures (Bd. Ex. 1-F, Case No. R-342, R. 55, 62, 129) was 175 to 155, it is obvious that these 114 votes had a decisive effect upon the result. A very serious question is therefore presented whether these former employees should have been permitted to vote, and whether their participation did not void the election.

The other branch of the case concerns the existence of substantial evidence to support the finding of discrimination in the discharges of Winans and Anderson. In the other eight cases of alleged discrimination, one was dismissed without any proof whatever, and the Board correctly found as to the other seven that the discharges were for valid business reasons, not because of Union membership or activity (R. 490-494). The proof as to Winans and Anderson was substantially identical with that in the other seven cases, yet the Board found discrimination without, as petitioner contends, any substantial evidence to support such finding, and the Circuit Court of Appeals affirmed such finding with extremely scant consideration (116 F. (2d) 586, 589, R. 517).

B. Jurisdiction.

This Court has jurisdiction to review the order of the Circuit Court of Appeals. Section 10 (e) of the National Labor Relations Act (49 Stat. 453, 29 U. S. C. A. § 160 (e)) provides in part:

> "The jurisdiction of the (Circuit) Court shall be final, except that the same shall be subject to review

> * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended."

Section 240 of the Judicial Code, as amended, (43 Stat. 938, 28 U. S. C. A. § 347) provides in part:

> "In any case, civil or criminal, in a circuit court of appeals * * * it shall be competent for the Supreme Court of the United States, upon petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

Section 350 of title 28 of the United States Code (43 Stat. 940, 28 U. S. C. A. § 350) provides in part:

> "No writ of error, appeal, or writ of certiorari intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree * * *"

The decree herein in the Circuit Court of Appeals for the Second Circuit was entered on February 8, 1941. This petition for writ of certiorari is filed on May 8, 1941.

C. The Questions Presented.

The questions presented upon this petition, which are more fully discussed above and in the brief accompanying this petition, may be stated as follows:

1. Whether, under Section 9 (a) of the National Labor Relations Act (49 Stat. 453, 29 U. S. C. A. § 159) a Union which has received a majority of the votes cast in an election, but not the affirmative vote of a majority of the em-

ployees in the appropriate unit, is entitled to act as the exclusive bargaining agent of all such employees.

2. Whether, under the facts of this case, it was an abuse of the Board's discretion to refuse to permit petitioner to have a representative present at the election for the purpose of checking the identity and eligibility of persons who presented themselves to vote, of challenging those deemed ineligible, and of determining whether or not said election was conducted according to the Direction of Election.

3. Whether persons who have been discharged for a valid business reason and whom the employer is under no commitment or duty to rehire are eligible to vote in an election to determine the bargaining representative for said employer's employees.

4. Whether the record contains any substantial evidence showing that petitioner discriminatorily discharged Francis B. Winans and Herbert S. Anderson because of Union membership or activity.

D. Reasons Relied On for the Allowance of the Writ.

1. The Board and Circuit Court of Appeals held that the Union was entitled to act as bargaining representative for all of petitioner's employees although it received the vote of a majority of those participating in the election but not the affirmative vote of a majority of the employees in the appropriate unit. This involves a highly important question of the construction of Section 9 (a) of the National Labor Relations Act (49 Stat. 453, 29 U. S. C. A. § 159) which has not been, but should be settled by this Court. The court below admitted (116 F. (2d) 586, 588, R. 517) that said section, when read literally, seemed to require the construction urged by petitioner. It is of the greatest importance to the Board in its enforcement of said Act and to a great number of employers and employees throughout the

country who are subject thereto that this question should be determined by this Court.

2. The court below held that the Board did not exceed its discretion in refusing to allow any representative of petitioner to be present at the election of February 24, 1938. In order to secure fair play at such elections and the consequent acceptance of the results thereof by all parties concerned, it is necessary to keep administrative discretion in such matters within proper bounds. This Court should, therefore, review and determine the question of whether or not such discretion properly goes to the extent of totally prohibiting one of the most vitally interested parties from having any representation or means of checking the conduct of the choice of bargaining representatives by its employees.

3. The court below further held that persons who had been discharged and whom petitioner was under no commitment or duty to rehire were eligible to participate in the choice of bargaining representatives. This question involves an extremely important question of Federal law which has not been, but should be settled by this Court, namely the construction of the word "employee" as used in sections 2 (3), 9 (a) and 9 (c) of the National Labor Relations Act (49 Stat. 450, 453, 29 U. S. C. A. §§ 152 (3), 159 (a) and 159 (c)). The question is of the greatest importance to all employers and employees subject to the Act, particularly those engaged in businesses which have a large labor turn-over, and must eventually be settled by this Court.

4. The final question concerns the quantum of evidence necessary to support a finding of discriminatory discharge. While the National Labor Relations Act, section 10 (f) (49 Stat. 453, 29 U. S. C. A. § 160 (f)) provides that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive," this Court has held in *Consolidated Edison*

Company of New York, Inc., v. *National Labor Relations Board*, 305 U. S. 197, 229, 59 S. Ct. 206, 216-217, that such evidence must be substantial and more than a mere scintilla. The court below, in upholding the Board's finding of discrimination in this case has entirely departed from the rule announced by this Court and has accepted the Board's findings even though not supported by any substantial evidence.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 9, *Marlin-Rockwell Corporation*, Petitioner v. *National Labor Relations Board*, Respondent"; and that said judgment of the said United States Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

MARLIN-ROCKWELL CORPORATION,
By A. C. DAVIS,
President,
DANA B. HELLINGS,
Counsel for the Petitioner.

O'BRIAN, HELLINGS, ULSH & MOREY,
Attorneys for the Petitioner,
Office and Post Office Address:
505 Iroquois Building,
Buffalo, New York.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1032

MARLIN-ROCKWELL CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

This is an application for a writ of certiorari to review a decree of the United States Circuit Court of Appeals for the Second Circuit, which modified and affirmed as modified an Order of the National Labor Relations Board.

Opinions.

The opinion of the Circuit Court of Appeals is reported in 116 F. (2d) 586; and those of the National Labor Relations Board in 5 N. L. R. B. 206, 7 N. L. R. B. 836 and 19 N. L. R. B. No. 71.

Jurisdiction.

The grounds upon which the jurisdiction of this Court is invoked are sufficiently stated on pages 7 and 8 of the petition annexed hereto.

Facts.

The material facts and circumstances are set forth in the petition annexed hereto. The questions involved are also stated in the petition but may, for convenience, be recapitulated here:

1. Whether, under Section 9 (a) of the National Labor Relations Act (49 Stat. 453, 29 U. S. C. A. § 159) a Union which has received a majority of the votes cast in an election, but not the affirmative vote of a majority of the employees in the appropriate unit, is entitled to act as the exclusive bargaining agent of all such employees.

2. Whether, under the facts of this case, it was an abuse of the Board's discretion to refuse to permit petitioner to have a representative present at the election for the purpose of checking the identity and eligibility of persons who presented themselves to vote, of challenging those deemed ineligible, and of determining whether or not said election was conducted according to the Direction of Election.

3. Whether persons who have been discharged for a valid business reason and whom the employer is under no commitment or duty to rehire are eligible to vote in an election to determine the bargaining representative for said employer's employees.

4. Whether the record contains any substantial evidence showing that petitioner discriminatorily discharged Francis B. Winans and Herbert S. Anderson because of Union membership or activity.

ARGUMENT.

I. The majority necessary to entitle a union to represent all employees in a unit is an important question of statutory construction which should be settled by this Court.

II. This Court should review the abuse of the Board's discretion in denying petitioner representation at the election.

III. The eligibility of discharged employees to vote in a bargaining election presents an important question of Federal law which has not been, but should be, settled by this Court.

IV. In holding that the Board's findings were supported by evidence, the decision of the Circuit Court of Appeals is probably contrary to prior decisions of this Court.

Point I. The majority necessary to entitle a union to represent all employees in a unit is an important question of statutory construction which should be settled by this Court.

The question of the majority necessary to entitle a union to act as the bargaining representative of all employees in the appropriate unit is of the greatest importance in the administration of the National Labor Relations Act (49 Stat. 449 *et seq.*).

Section 9 (a) of said Act (49 Stat. 453, 29 U. S. C. A. § 159 (a)) provides:

> "Representatives *designated* or selected for the purposes of collective bargaining *by a majority of the employees in a unit* appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining * * * (italics supplied.)"

The Board itself has successively announced and adopted three different rules on the subject.

Commerce Clearing House, Inc., Labor Law Service (Pars. 4510-4520).

See also *First Annual Report, National Labor Relations Board,* (1936) pp. 89, 108.

First the Board adopted what petitioner contends is the correct rule, namely, that a Union must receive the actual designation of a majority of the employees before it is entitled to act as the representative of all.

Chrysler Corp., 1 N. L. R. B. 164.

Later the Board adopted the so-called "quorum rule", namely, that a Union receiving a majority of the votes at an election in which a majority of the employees participated was entitled to act as the bargaining representative of all of the employees, notwithstanding that its vote was less than a majority of all such employees.

The Associated Press, 1 N. L. R. B. 686, (this point was not involved in the review of this case by this Court, 301 U. S. 650).

New England Transportation Co., 1 N. L. R. B. 130; *Lukenbach Steamship Co.*, 2 N. L. R. B. 181.

This "quorum rule" seems to have been approved by the only court which has passed upon the question.

N. L. R. B. v. *Whittier Mills Co.*, 111 F. (2d) 474 (C. C. A. 5).

Nevertheless, the Board, in *R. C. A. Mfg. Co. Inc.* 2. N. L. R. B. 159, adopted still a different rule, namely, that a Union which receives a majority of the votes at an election is entitled to certification as the bargaining representative of all employees in the unit, regardless of the number of voters participating in such election. The certification in the instant case purports to have been made under this rule (Res. Ex. 4, Case No. III-C-165, R. 128, 130, 258). No court has yet expressed its approval of this third rule.

Furthermore, even at the present time, the Board interprets the statute in different ways when the proof of majority designation is presented by different methods. Thus if the designation is shown by union membership or desig-

nation cards, the Board correctly insists that affirmative designation by a majority of the employees in the unit be shown whereas, as above stated, if designation is made through an election, the Board requires only a majority of the votes cast, regardless of the relation of such number to an actual majority of the employees eligible. The Act itself makes no such differentiation. True, it contemplates that various means may be employed to prove designation, but it provides one simple rule for determining whether majority designation has been achieved, whatever the means employed for proving it, namely that the exclusive representatives shall be the "representatives *designated* * * * *by a majority of the employees in a unit.*"

Petitioner contends that the rule originally adopted by the Board is correct, and that the later interpretations are erroneous. The language of the Act itself is clear and unambiguous and literally requires, as admitted by the court below (116 F. (2d) 586, 588, R. 517) that a union must receive the affirmative designation of a majority of the employees in the unit (whether by election, designation cards or other method) before it is entitled to represent all of such employees for purposes of collective bargaining.

The court below cited (116 F. (2d), at p. 588) the case of *Virginian Ry.* v. *Federation,* 300 U. S. 515, 560, which held that a union receiving a majority of the votes cast in an election in which a majority of the employees participated was entitled to be certified as a representative of all such employees under the Railway Labor Act (44 Stat. 577, as amended by 48 Stat. 1185, 45 U. S. C. A., §§151-163). In other words, this Court in the *Virginian* case decided that the so-called "quorum rule" was prescribed by the Railway Labor Act. It did not and could not decide that the rule adopted by the Board in the *R. C. A. Mfg. Co.* case (*supra*) was applicable either to the Railway Labor Act or to the National Labor Relations Act. That question was not be-

fore it. In the *Virginian* case, the District Judge had squarely rejected the rule later adopted by the Board in the *R. C. A. Mfg. Co.* case, for he held that a certification was void when based on an election in which less than a majority of the eligible employees voted (11 F. Supp. 621, 628). This point was not appealed to the Circuit Court of Appeals (84 F. (2d) 641, 652) and, of course, was not before this Court.

Furthermore, the decision in the *Virginian* case could be important only as an analogy. The language of the National Labor Relations Act ("representatives designated * * * by a majority of the employees in a unit") much more clearly requires the affirmative designation of a majority of such employees than does the language of the Railway Labor Act ("The majority of any craft or class of employees shall have the right to determine who shall be the representatives"). Whereas the Railway Labor Act clearly envisions the "quorum rule", the National Labor Relations Act equally clearly requires an affirmative majority designation.

In any event, it is essential to both employers and employees who are subject to the Act that the interpretation of this section shall be finally settled by this Court, rather than that such a matter of pure statutory construction shall be left subject to the changing interpretation of the Board.

Point II. This Court should review the abuse of the Board's discretion in denying petitioner representation at the election.

The choice of the persons or organizations who are to represent the employees in the collective bargaining process is obviously one of the most fundamental steps in the whole field of labor relations. And since that step is more exposed

to fraud and mistake than perhaps any other step in such process, the need for the greatest possible safeguards against such fraud and mistake is equally obvious.

Under Section 9 (c) of the National Labor Relations Act (49 Stat. 453, 29 U. S. C. A., § 159 (c)) the Board has power and discretion to investigate and determine the designation of a bargaining representative by the employees. But with that power and discretion goes a duty to utilize all possible means for assuring that the real choice of the actual employees is ascertained, and that by methods, the fairness of which will be patent to all. Consider, then, what happened in the case at bar.

The procedure adopted for the August 21, 1937, election, and there agreed upon by all parties (Board, Union and petitioner) as fair and equitable was that a representative of the Board should preside at the election and that representatives of the Union and petitioner should be present and act as tellers in order to check the eligibility of voters and to see that the election was conducted according to the terms agreed upon (R. 22-23, 32-35, 247-249). However, in the election of February 24, 1938, when petitioner asked for similar representation, the request was denied (Bd. Ex. 1-E, Case No. R-342, R. 54-55, 62). This denial was expressly based on the ground of the Board's general policy to prohibit the presence of any representative of the employer unless the Union consented (which it here refused to do) and in no way upon any interference or irregularity in the former election.

It is unquestioned that petitioner made adequate and timely requests, both in writing and orally, for such representation, that the grounds upon which such requests were based were fully specified, and that such requests were unconditionally denied (Bd. Exs. 1-B, 1-D and 1-E, Case No. R-342, R. 48-49, 52-55, 62, 74-76, 257-258).

The underlying reasons why petitioner desired and should have been allowed to have a representative present at such election are simple and obvious. Petitioner was a party to the proceedings and had a very real interest in the outcome of the election. This interest was not in whether the Union was or was not chosen as the bargaining agent, but in whether or not the choice was fairly made and represented the real wishes of petitioner's employees.

In the said election certain men who were not eligible to vote were permitted to do so, and their votes were counted; on the other hand, representatives of the Union, who of course were permitted to attend the election, challenged certain other voters and these challenges were accepted by the Board's representative without any investigation with the result that the votes of these men were not counted, although they were clearly eligible. Some of these cases appear from the evidence (R. 93-110). How many more such cases there actually were, petitioner does not and cannot know. Furthermore petitioner has no means of knowing and does not know whether or not the persons who voted under names appearing on petitioner's payroll of September 24, 1937, were actually the same persons then employed by petitioner. The opportunities for fraud and mistakes in the conduct of the election are obvious; the equally obvious means for guarding against them were rejected by the Board. The presence of a representative of the petitioner at the election, while in no possible way affecting the results of properly cast votes would have obviated such abuses in the conduct thereof.

Petitioner contends that under the facts shown it did not receive "procedural due process" and that this Court should intervene to settle and state the limits of administrative discretion in ascertaining the employees' choice of a bargaining representative.

Point III. The eligibility of discharged employees to vote in a bargaining election presents an important question of Federal law which has not been, but should be, settled by this Court.

Inseparably interwoven into the question of the selection of bargaining representatives is the question of eligibility to participate in such selection. The National Labor Relations Act provides in Section 9 (a) (49 Stat. 453, 29 U. S. C. A., § 159 (a)) that such designation or selection shall be made by "the employees in a unit appropriate for such purposes", and in Section 9 (c) (49 Stat. 453, 29 U. S. C. A., § 159 (c)) that the Board, in investigating such designation, "may take a secret ballot of employees".

The problem, therefore, is the construction of the term "employee", which is defined in Section 2 (3) (49 Stat. 450, 29 U. S. C. A., § 152 (3)) as follows:

> "(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the chapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *."

Because of a very serious slump in business, petitioner found it necessary to discharge 174 of its employees during the period between September 24, 1937, and February 24, 1938, that is, between the date by which the Board determined the eligibility of voters and the date of the election. That the decline in business, which continued for many months, compelled a reduction in the working force is overwhelmingly demonstrated by the evidence (Res. Ex. 9, Case No. III-C-165, R. 166-167, 270-272, 277-279). There is no finding to the contrary by either the Board or Court. Thus

it is apparent that, with the possible exception of Winans and Anderson, none of those 174 workmen could in any manner claim to be an "individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice."

It is equally undisputed that petitioner was under no obligation to rehire any of these men, and the Board and court below correctly so found (116 F. (2d) 586, 588, Res. Ex. 4, Case No. III-C-165, R. 128, 131, 258, 516).

Nevertheless, the Board concluded (R. 131, 487) that these 174 former employees—workmen who had been discharged for a valid business reason and whom petitioner was under no obligation to rehire—were entitled to participate in the selection of a bargaining representative for petitioner's employees, and 114 of them did actually vote in that election (Res. Ex. 4, Case No. R-342, R. 60, 65).

These workmen were not "employees" of the petitioner in any ordinary sense at the time of the election, and if a special definition of the term, beyond that set out in the Act itself, is to be adopted, it is important that it should be reviewed and settled by this Court.

The court below cited two cases as authority for its departure from the plain meaning of section 9 (a), both of which are clearly distinguishable from the case at bar.

In *Nashville, C. & St. L. Ry.* v. *Railway Employees' Dept.*, 93 F. (2d) 340, 342, a laid-off employee with seniority rights was held eligible to vote in an election under the Railway Labor Act. There was and is no seniority rule in petitioner's plant (R. 243, 286-287, 314), and both the Board (R. 441) and the Circuit Court of Appeals (116 F. (2d) 586, 588, R. 516) so found.

In *National Labor Relations Board* v. *Waterman S. S. Co.*, 309 U. S. 206, 213-214, 219, the Board found there was a continuing contractual employment despite the maritime practice of "signing off" shipping articles, and this Court

held there was sufficient evidence to support such finding. In the case at bar, the testimony clearly showed that there was no obligation to rehire such discharged employees (Res. Ex. 4, Case No. III-C-165, R. 128, 131, 258) and the court below expressly so found (116 F. (2d) 586, 588, R. 516).

Neither of these cases, therefore, supports the decision below, for in both there was an obligation to continue or resume the employment relation. In the case at bar there was no such obligation; it could not possibly be determined how many or who of the 174 former employees would ever return to work at petitioner's plant, for petitioner had and has an unquestionable legal right to refuse to rehire any or all of them so long as it does not use such right as a cloak to cover discrimination against the Union.

National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45-46.

First Annual Report, National Labor Relations Board, p. 77.

The court below rested its decision upon the "mutual expectation of reemployment" (116 F. (2d) 586, 588, R. 516). But one who expects to be an employee at some future date is not now an employee within the definition contained in section 2 (3) of the Act (49 Stat. 450, 29 U. S. C. A. 152 (3)), when he has no present right to such reemployment.

The court below has, therefore, gone far beyond the statute and beyond any decision of this Court in deciding this important question of statutory construction. The question is of the utmost importance, especially in industries in which the labor turnover is large and rapid. Are all former employees who hope or "expect" to be reemployed at some future date to be allowed to participate in the choice of bargaining representatives? Such a ruling would easily lead to the absurd situation that the number

of "employees" entitled to vote in such an election might be several times as great as the number who ever had been or could be employed at any one time. And in such event, what is left of the right the actual employees—those actually working in the plant—"to bargain collectively through representatives *of their own choosing*" (Section 7, 49 Stat. 452, 29 U. S. C. A. § 157)?

Petitioner submits that the court below has decided a Federal question of great public importance in a way which goes far beyond any decision of this Court, and that this important question should be reviewed and determined by this Court.

Point IV. In holding that the Board's findings were supported by evidence, the decision of the Circuit Court of Appeals is probably contrary to prior decisions of this Court.

This Court has settled the rule regarding the amount of evidence necessary to support a finding of the Board and to make the same conclusive under the statute. In *Consolidated Edison Company of New York Inc.* v. *National Labor Relations Board*, 305 U. S. 197, 229, this Court, per the Chief Justice, said:

> "We agree that the Statute, in providing that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive,' means supported by substantial evidence.—Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Now, what "substantial evidence" did the court below accept as supporting the Board's findings of discriminatory discharge? The entire opinion of the court below as to this point is as follows (116 F. (2d) 586, 589, R. 517):

> "As to that part of the order directing the reinstatement of Winans and Anderson little need be said. The

words which each put in the mouth of the foreman who laid him off, if the Board cared to credit their testimony in preference to the reasons given by the company witnesses, require us to accept the finding of discrimination; we cannot say that it is wholly without 'substantial evidence'."

The entire testimony of Winans on this subject—the "words he put in the mouth of the foreman who laid him off"—is so short that it may profitably be quoted here (R. 233-234, 242, 243):

"Q. Who laid you off?
A. Fred Johnson, the foreman.
Q. Your foreman?
A. Yes.
Q. Did you have some conversation with him at the time you were laid off?
A. I did.
Q. Was anybody else there besides yourself and Mr. Johnson?
A. No, nobody. He came over to the machine where I was and talked to me.
Q. The conversation took place when, please, that is, what time of day?
A. Just before quitting time, I would say just a half hour or an hour.
Q. What time is quitting time?
A. Four thirty.
Q. Will you tell us what Mr. Johnson had to say to you?
A. It was about four o'clock at the time. We had worked later before that.
Q. What did Mr. Johnson have to say to you when he laid you off?
A. He came over and he said, 'I am very sorry, I got some bad news for you.'
Q. What else did he say, if anything?
A. Well, that is what he said, and he said, 'I got to lay you off', and I said, 'Well, I am not surprised. I have been expecting it for a long time.' Well, he said, 'I got bad news for you, I got to lay you off'.

Q. Yes.

A. And I told him I had been expecting it, I didn't think my position in the union was doing me any good at the time. He said 'That is something I am not at liberty to talk to you about, not at liberty to discuss with you.'

Q. Was anything else said?

A. He said, 'I haven't anything against your work, and nothing against you. So far you have conducted yourself, done your work well, and as soon as things pick up to normal again I will try to get you back on.' "

* * * * * * *

"Q. What did your foreman tell you about your chances of getting back to work at the time you were laid off in January?

A. He said he would do his best to take me on as soon as things picked up. He said the reason he had to lay me off there were old employees out in the other part of the shop, and he would have to give them the preference, they would have to be given the preference."

* * * * * * *

"Q. (By Mr. Crotty) When did Mr. Johnson tell you the other people, these older people in other departments were to be given preference when it came to transferring them in your department?

A. When he explained to me that things in the shop were slack, and he had to lay off about three of us in there.

Q. Was this about the time you were laid off?

A. Yes."

Of what do these "words" consist? A simple statement of fact that things in the shop were slack and that certain employees, including Winans, would have to be laid off. Naturally that is "bad news" for any one in such a situation. That lack of work was the only reason is further shown by the foreman's statement that he had nothing

against Winans or his work and would try to get him back on again when things picked up to normal, which certainly had not occurred by the time of the hearing (Res. Ex. 9 and 10, R. 166-167, 271-274). Finally, there is the statement that the foreman was not at liberty to discuss the Union or Winans' position in it. This was unquestionably true, in view of the specific instructions from the Superintendent that the foremen were not to discuss the Union or unionism with the men in any way, shape or form (R. 327, 291-292, 323-337). The mere fact that the foreman had been instructed not to discuss the Union obviously cannot be twisted into an admission that Winans was discharged because of Union activity.

Thus it is apparent that there is nothing in the statements of Winans' foreman which was substantial evidence in support of the Board's finding of discrimination.

Anderson's testimony in regard to the statements of the foreman at the time of his discharge is even less specific (R. 194-195):

> "Q. Who laid you off?
>
> A. Mr. O'Brian, the foreman came and told me.
>
> Q. Did you have any conversation with Mr. O'Brian when he laid you off?
>
> A. It was about five minutes before the time to quit.
>
> Q. Was this the lunch time, was it at lunch time or in the evening?
>
> A. In the evening, in the afternoon, about five to four, and he came and told me he had bad news for me, that he would have to lay me off. He said, 'I will have to lay you off', and I said, 'It isn't any surprise to me, because I have been expecting this for sometime.' And I said, 'It seems to me you could pick on some of the newer men, because my services here are much longer than theirs, than some of them, and they are being retained, and I couldn't understand it'—he thought the company was being fair in regard the lay-off, I thought the company was unfair in calling his attention to the bore grinding department, as there had

been practically all the union members laid off, and the night crew, they were non-union members, had been retained and put on in the day time.

Q. What?

A. The night crew, that had been working nights, most of them were not members of the union, and the members of the union had been laid off, that were working in the day time, and being replaced by non-union members that were working nights.

Q. Was there anything else said at that time, do you know?

A. I asked Mr. O'Brian, or was wondering if I could not see Mr. Brandel, that I thought that I was being discriminated against."

There is not even a scintilla of evidence in this testimony to the effect that the foreman admitted, expressly or inferentially, that Anderson's discharge was caused by his Union activity. Anderson did practically all of the talking; the foreman merely stated that he would have to lay Anderson off and that he thought the company was being fair in regard to the layoff. Where could the Court below possibly find "substantial evidence" in these "words put in the mouth of the foreman"?

It is thus apparent that the court below has departed widely from the decision of this Court in the *Consolidated Edison* case (*supra*). Petitioner, therefore, calls upon this Court to exercise its power of supervision in order to secure uniformity in the enforcement of this Act.

Conclusion.

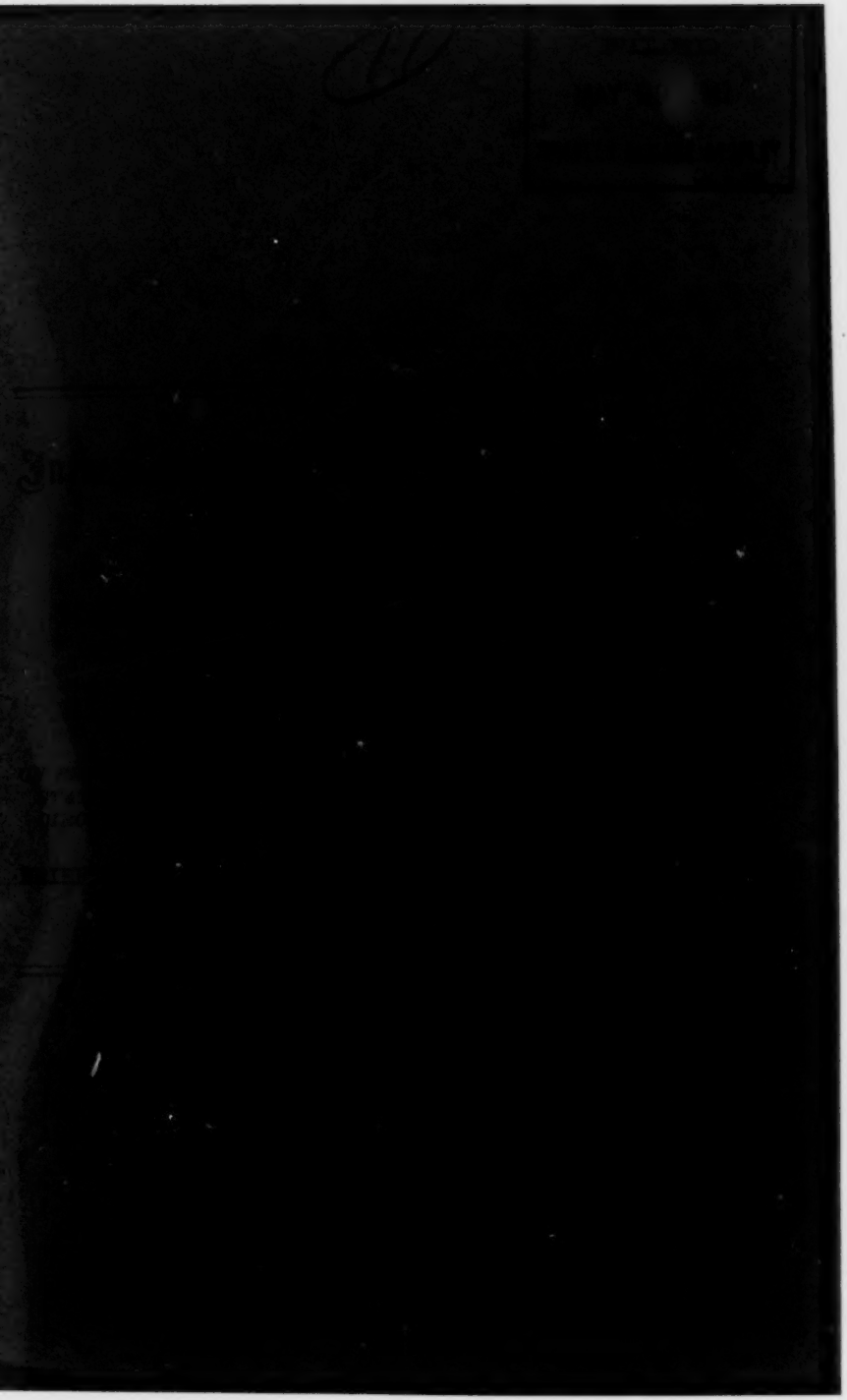
Petitioner respectfully submits that this case presents questions of law in regard to the designation of collective bargaining representatives, the Board's discretion in conducting the selection of such representatives and eligibility to participate in such selection which are of the utmost importance to a great many employers and employees subject

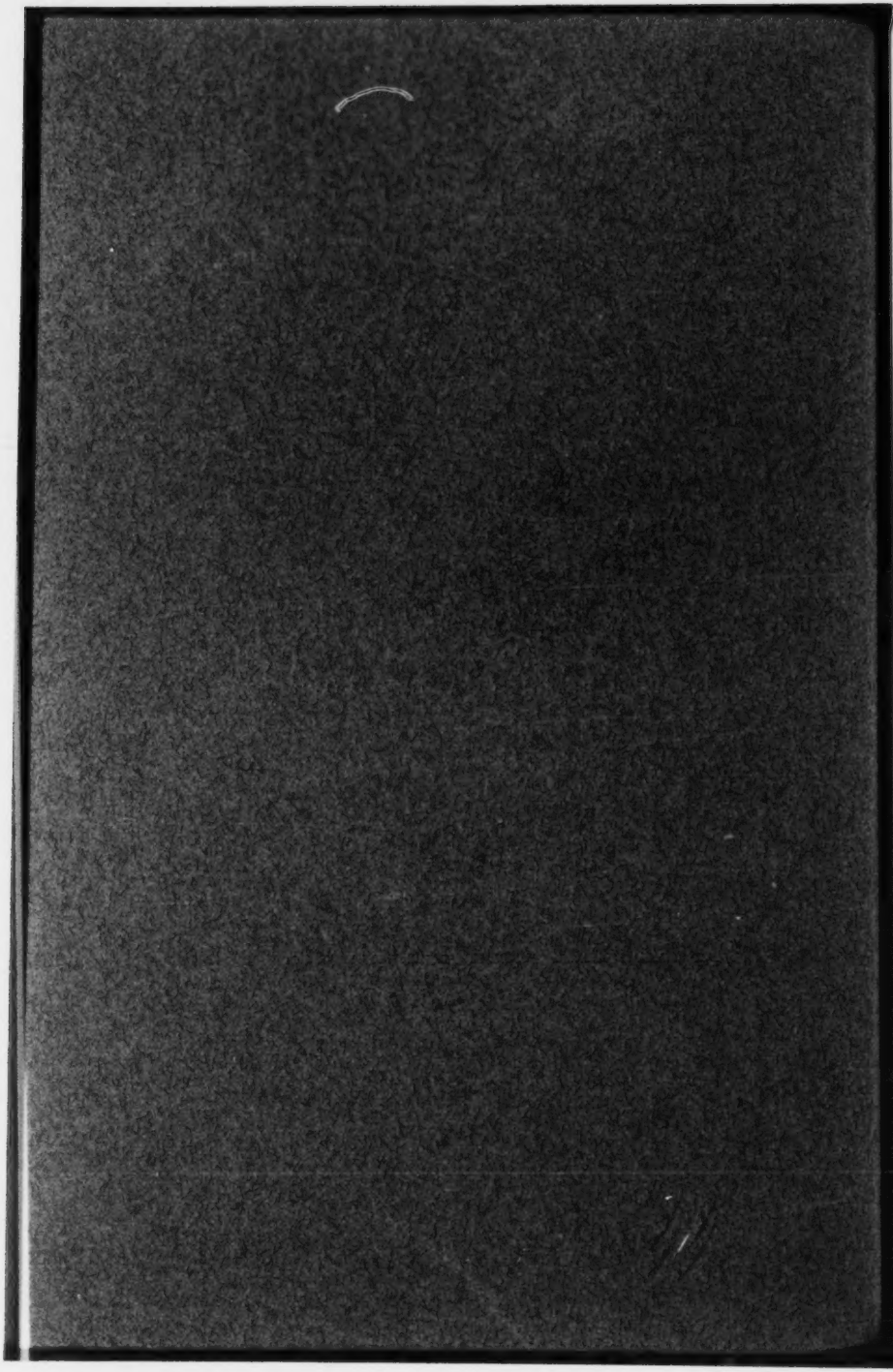
to the Act, and which have not been, but should be, settled by this Court; and further that the decision of the Circuit Court of Appeals below that the findings of the Board were supported by evidence is contrary to the previous decisions of this Court and to sound principles of law. For these reasons petitioner respectfully requests that this Court review and reverse the decision below.

Respectfully submitted,

DANA B. HELLINGS,
Counsel for Petitioner.

O'BRIAN, HELLINGS, ULSH & MOREY,
Attorneys for the Petitioner.
Office and Post Office Address,
505 Iroquois Building,
Buffalo, New York.





INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	7
Conclusion	12
Appendix	13

CITATIONS

Cases:

Nashville C. & St. L. Ry. v. *Railway Employees Department*, 93 F. (2d) 340, certiorari denied 303 U. S. 649 — 11

National Labor Relations Board v. *Falk Corp.*, 308 U. S. 453 — 10, 12

National Labor Relations Board v. *Waterman Steamship Corp.*, 309 U. S. 206 — 11

National Labor Relations Board v. *Whittier Mills Co.*, 111 F. (2d) 474 — 8

New York Handkerchief Mfg. Co. v. *National Labor Relations Board*, 114 F. (2d) 144, certiorari denied, No. 493, this Term — 8

North Whittier Heights Citrus Association v. *National Labor Relations Board*, 109 F. (2d) 76, certiorari denied, 310 U. S. 632 — 11

Southern Steamship Co. v. *National Labor Relations Board*, decided May 6, 1941 — 8

Virginian Railway Co. v. *System Federation No. 40*, 300 U. S. 515 — 8

Statute:

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Supp. V, Sec. 151, *et seq.*):

Sec. 7 — 13

Sec. 8 — 13

Sec. 9 — 13

Miscellaneous:

First Annual Report of the National Mediation Board (1935), p. 4 — 9

Lorwin & Wubnig, *Labor Relations Boards* (Brookings Institution, 1935), pp. 159–161 — 9

Third Annual Report of the National Labor Relations Board (1938), p. 147 — 9

320603—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 1032

MARLIN-ROCKWELL CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 513–517) is reported in 116 F. (2d) 586. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 475–504) are reported in 19 N. L. R. B. 648.

JURISDICTION

The decree of the court below (R. 518–520) was entered on February 8, 1941. The petition for a writ of certiorari was filed on May 8, 1941. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether under Section 9 of the National Labor Relations Act, the National Labor Relations Board may validly certify as the exclusive representative of the employees a labor organization which received a majority of the votes cast, but less than a majority of those eligible, in an election in which a majority of those eligible voted.

2. Whether, in the circumstances of this case, the Board abused its discretion in refusing to permit a representative of the employer to be present at the election.

3. Whether there was substantial evidence to support the Board's findings that employees laid off by petitioner during a seasonal slack period, but who would normally be returned to work upon the resumption of regular operations, retained an employee status so as to entitle them to vote in the election.

4. Whether there was substantial evidence to support the Board's findings that petitioner discriminatorily discharged two employees in violation of Section 8 (3) and (1) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix.

STATEMENT

On February 11, 1938, in proceedings under Section 9 of the Act in which petitioner and United Automobile Workers of America, Local No. 338, herein called the Union, participated and as to which no question is raised, the Board issued its Decision and Direction of Election (R. 38–47). Therein the Board found that a question affecting commerce had arisen concerning the representation of petitioner's employees (R. 41–42), determined the appropriate unit (R. 42–44), and directed that a secret ballot election be conducted by its Regional Director (R. 47). On February 21, 1938, petitioner moved for permission to have a representative present at the election (R. 48–49); the Regional Director denied the motion (R. 54–55).

The election was held on February 24, 1938 (R. 56). Thereafter, the Regional Director issued a report stating that the results of the election were as follows (R. 56):

Total number eligible to vote	407
Total number of ballots counted	330
Ballots in favor of the Union	175
Ballots against the Union	155
Void ballots	2
Challenged ballots	9

The Regional Director recommended that the Union be certified as exclusive bargaining representative (R. 56–57). Petitioner filed objections and exceptions to the election and to the report thereon (R. 57–59). On June 10, 1938, after a

hearing on the objections and exceptions before a trial examiner (R. 61–128), the Board certified the Union as exclusive representative of the employees within the appropriate unit (R. 128–133).

On August 10, 1938, the Board upon charges and amended charges filed by the Union pursuant to Section 10 of the Act (R. 133–135), issued a complaint against petitioner alleging that petitioner had violated Section 8 (1), (3), and (5) of the Act by refusing to bargain collectively with the Union despite the latter's certification by the Board as exclusive representative of the employees, by terminating the employment of certain employees because of their union membership and activity, and by other acts of interference, restraint, and coercion (R. 136–141). On January 19, 1940, following a hearing and other usual procedural steps under Section 10 of the Act, the Board issued its decision setting forth its findings of fact, conclusions of law, and order (R. 475–504). The facts as found by the Board and as shown by the evidence may be summarized as follows:[1]

Petitioner manufactures and sells ball bearings and is extensively engaged in interstate commerce (R. 479–480, 499; 162–164). Immediately preceding a "consent" election[2] held on August 21, 1937,

---

[1] The references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

[2] A "consent" election is one arranged through agreement of the parties; it is not directed, nor does it result in a formal

to determine whether petitioner's employees desired to be represented by the Union for collective bargaining purposes, Martin Peterson, a foreman, warned various of the employees that the plant would be shut down if the Union were successful (R. 488, 207, 224–225, 226–228), and Leonhart, assistant superintendent of the plant, questioned Anderson, the secretary-treasurer of the Union, concerning his activity in and other affairs of the Union (R. 488–489; 341–342, 372–373). After the certification of the Union as exclusive representative on the basis of the Board-directed election held on February 24, 1938 (*supra*, pp. 3–4), petitioner admittedly refused to recognize and bargain collectively with the Union (R. 485–488; 150–151, 165–166, 175–177, 267–270, 338–339). During the course of a seasonal decline in business, petitioner laid off Winans and Anderson, president and secretary-treasurer of the Union, respectively (R. 494, 497; 233, 183–184). In view of the fact that Anderson and Winans were the leading figures in the

---

certification by the Board under Section 9 of the Act. While its results are frequently accepted as evidence of majority in a later case, the Board gave no effect to the consent election in this case because "a large number of employees who would otherwise have done so failed to vote on account of delay in the opening of the polls," and because "the employees who were eligible to vote at the consent election differ somewhat from the employees in the unit which we find appropriate for collective bargaining purposes" (R. 45–46, 483).

Union, that Anderson had been warned against certain union activities, and that in both cases petitioner disregarded its normal practice in reducing and recalling personnel,[3] the Board found that the lay-offs were discriminatory (R. 496, 498).

The Board concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1), (3), and (5) of the Act (R. 488, 489, 496–497, 498–499, 500–501), and ordered petitioner to cease and desist therefrom, to bargain collectively with the Union, to offer reinstatement with back pay to Winans and Anderson, and to post appropriate notices (R. 501–504).

In February 1940 petitioner filed in the court below its petition to review and set aside the

---

[3] In determining the individuals to be laid off in a particular department, petitioner customarily went over the list of its employees in the department involved and considered their ability, efficiency, productiveness, willingness, the number and kinds of jobs each was trained to do, and, all other things being equal, seniority and the number of their dependents. The employee who by these tests seemed of least value was then laid off. In addition, as a means of retaining the services of exceptionally valuable employees, petitioner would sometimes transfer such employees from a department where they were not needed to another department in which less valuable men were working; the least valuable employee in that department was then laid off. When additional labor was needed, the same procedure was followed in deciding which of the laid-off employees should be reinstated (R. 491; 81, 280–287, 304–305, 314, 317, 343–346).

Winans' value as a worker was equal to that of two other workers, Peterson and Perry, who were retained in the

Board's order (R. I–VI); the Board requested enforcement (R. VI–X). On January 6, 1941, the court handed down its decision enforcing the Board's order, with modifications not here material (R. 513–517). A decree was entered accordingly on February 8, 1941 (R. 518–520).

ARGUMENT

1. The court below held that the Board's certification of the Union as exclusive bargaining representative was valid and that petitioner accordingly was under a duty to bargain collectively with that organization. The various grounds urged by petitioner to justify its refusal to honor the certification are without merit and present no questions warranting review.

(a) Petitioner contends (Pet. 9, 15–18) that the certification of the Union is invalid because the total vote it received was less than a majority of those eligible to vote, although those voting constituted a majority of those eligible and the Union

---

department, and was also equal to that of another workman, Greene, who was transferred from another department to take Winans' place (R. 494–496; 231, 235–237, 244, 395, 418–422). Seniority and the number of dependents should, therefore, have been the determinative factors. If applied, Winans, who was released, would have been retained (R. 491–495; 213, 235–236, 241, 302, 317–319, 390).

Anderson was a more valuable workman than Echlund, a fellow employee, since Echlund was laid off before Anderson (R. 498; 206, 395). Nevertheless Echlund was recalled before Anderson, who had not been reinstated at the time of the hearing (*ibid.*).

received a majority of votes cast. The contention is contrary to the decision of this Court interpreting the comparable provisions of the Railway Labor Act. *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515. It has likewise been rejected by the two other Circuit Courts of Appeals which have interpreted the majority rule provisions contained in Section 9 (a) of the National Labor Relations Act. *National Labor Relations Board* v. *Whittier Mills Co.,* 111 F. (2d) 474, 477–478 (C. C. A. 5); *New York Handkerchief Mfg. Co.* v. *National Labor Relations Board,* 114 F. (2d) 144, 148–149 (C. C. A. 7), certiorari denied, No. 493, this Term. The question whether a certification may validly issue when less than a majority of eligible voters participate in an election, which petitioner seeks to import into this case (Pet. 16–17), is not presented;[4] a majority of those eligible voted (*supra,* p. 3).

(b) The holding of the court below (R. 515–516) that the Board did not abuse its discretion in refusing to permit representatives of the employer to be present at the polls during the election is in accord with the only other decision upon the question. *Southern Steamship Co.* v. *National Labor Relations Board,* decided May 6, 1941 (C. C. A. 3d). While the presence of employer representatives may prove helpful to the repre-

---

[4] That question was present in the *New York Handkerchief* case, *supra.*

sentatives of the Board conducting the election in determining the eligibility of the voters, their presence may, even where not intended, have the effect of inhibiting the employees so that the election results do not reflect the free and independent choice contemplated by the statute. Accordingly, as a general rule, the Board has not allowed employer representatives to be present at the polls unless the labor organization involved consents. *Third Annual Report of the Board* (1938), p. 147.[5] This procedure was particularly appropriate in this case in view of evidence that at a consent election previously held the employees had voiced their apprehension at the presence of employer representatives (R. 26–31). Moreover, petitioner has shown no prejudice, although at the hearing held after the election (R. 61–128) it had full opportunity to challenge the conduct of the election. In these circumstances, the propriety of the exercise of the Board's discretion does not present any question calling for review.

(c) Petitioner challenges (Pet. p. 21–24) the finding of the Board that, for purposes of eligibility to vote at the election, employees who had been laid off because of a seasonal slack in produc-

---

[5] Employer representatives were not permitted to be present at elections conducted by the old National Labor Board which administered Section 7 (a) of the National Industrial Recovery Act. Lorwin & Wubnig, *Labor Relations Boards* (Brookings Institution, 1935), pp. 159–161. See also, *First Annual Report of the National Mediation Board* (1935), p. 4.

tion, but who would normally be recalled upon the resumption of regular operation, retained their employee status and had an interest in the election (R. 131–132, 483–484).[6] The court below sustained the finding (R. 516–517.)[7] The evidence amply supports the concurrent holdings of the Board and the reviewing court upon this issue of fact. *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 461.

It is undisputed that it has been petitioner's established practice to recall to work as production increased employees theretofore laid off because of fluctuations in petitioner's highly seasonal operations (R. 20, 25, 80–85, 91, 179–180, 218, 219–223, 228–230, 296–298, 314–317, 337–338, 351–352, 374); that it was petitioner's intention to adhere to that practice in this instance (R. 78–79, 86–91), that for this purpose petitioner retained a list of the names of the employees laid off (R. 76–79, 81–83);

---

[6] The Direction of Election provided that employees "on the pay roll as of September 24, 1937, excluding those who have since quit or been discharged for cause" were eligible to vote (R. 47). The Board and the court below construed the term "discharge for cause" as encompassing only those who were finally discharged for fault, not those who were merely laid off because of seasonal business fluctuations (R. 132, 516).

[7] Only two of the 114 men in this category who voted were shown to have obtained equivalent positions with other employers; the court below held that they should have been considered as having quit petitioner's service, but that "throwing out their ballots would not change the result of the election" (R. 516–517).

and that, until this case, petitioner had always used the term "lay-off" rather than "discharge" to describe the result of such a seasonal reduction in force (R. 374).[8] Upon this evidence it is plain that the Board could find as a fact that such a reduction did not completely sever the employment relationship and that the employees so laid off retained an interest in the outcome of the election sufficient to warrant their participation. See *North Whittier Heights Citrus Association* v. *National Labor Relations Board,* 109 F. (2d) 76, 82 (C. C. A. 9), certiorari denied, 310 U. S. 632, and *Nashville C. & St. L. Ry.* v. *Railway Employees Department,* 93 F. (2d) 340, 342–343 (C. C. A. 6), certiorari denied, 303 U. S. 649.[9] The finding is further supported by the decision of this Court in *National Labor Relations Board* v. *Waterman Steamship Corp.,* 309 U. S. 206, 219. That petitioner had a "legal right" (Pet. pp. 22–23) not to return the men to work is not material.[10]

---

[8] See also R. 3–4, where petitioner, in an answer to another and earlier complaint of the Board, alleged that workers similarly released were not discharged, but merely laid off, and would be recalled "as soon as business conditions warranted."

[9] The *North Whittier Heights* case is closely in point. See the Board's opposition to certiorari in that case, pp. 16–19.

[10] The employer enjoyed the same right with respect to the seamen in the *Waterman* case. And, although the employees in the *Nashville* case retained seniority rights, there was no legal obligation to return the men to active work; the Court expressly noticed that the men might "never again be employed" (95 F. (2d) at 342).

2. The contention (Pet. 24–24) that the Board's findings on the issue of discrimination against Winans and Anderson are not supported by substantial evidence presents no question for review in view of the concurrent holdings of the Board and the court upon the fact issue. *National Labor Relations Board* v. *Falk Corporation, supra.* Further, the evidence summarized in the Statement (*supra,* pp. 5–7) affords adequate support for the findings.

CONCLUSION

The decision below is correct, no question of importance is presented, and there is no conflict of decisions. The petition should, therefore, be denied.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.
ARNOLD RAUM,
Special Assistant to the Attorney General.
ROBERT B. WATTS,
General Counsel,
LAURENCE A. KNAPP,
Associate General Counsel,
SAMUEL EDES,
Attorney,
National Labor Relations Board.

MAY 1941.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; 29 U. S. C., Supp. V., Sec. 151 *et seq.*) are as follows:

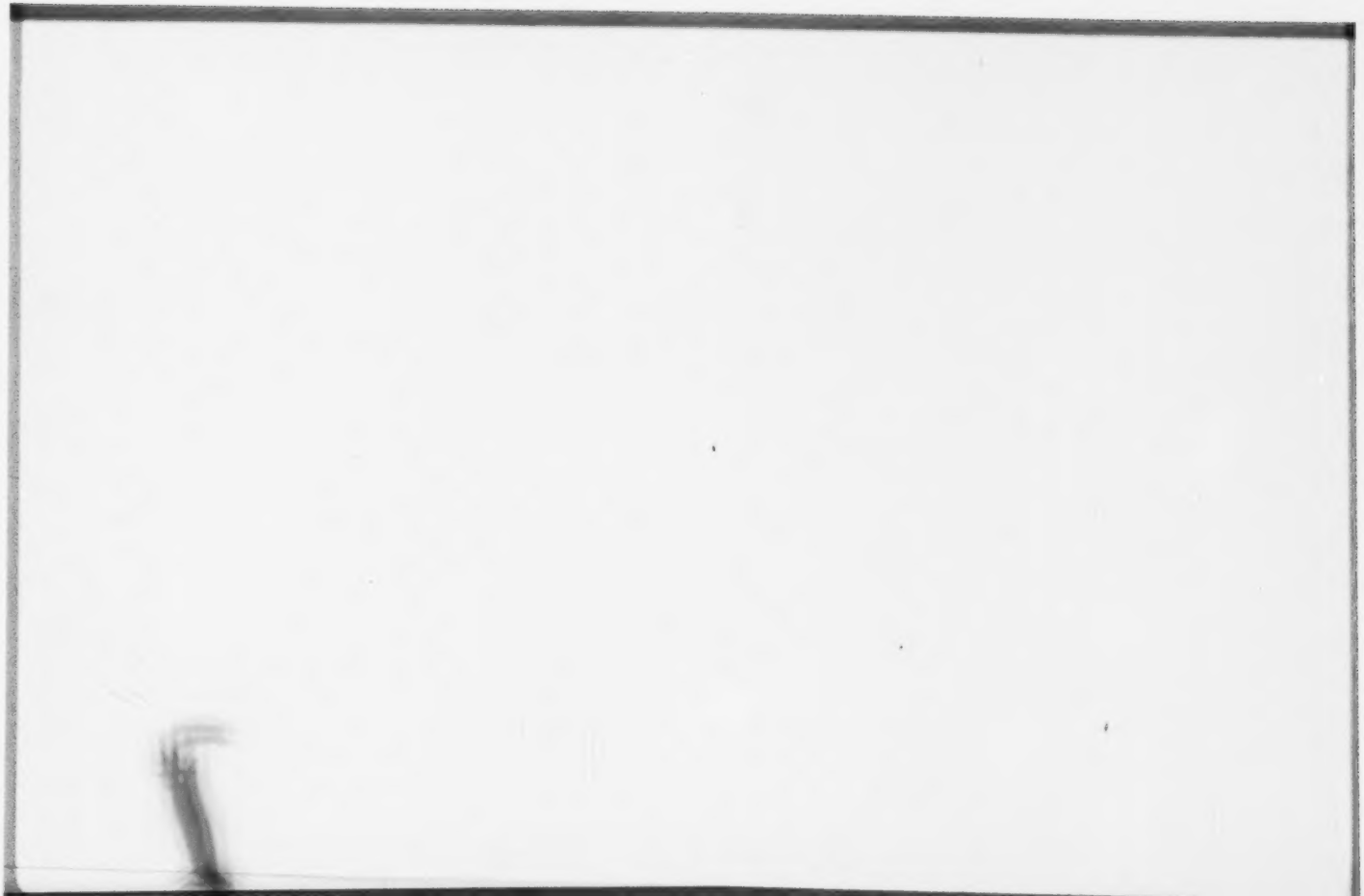
> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *
>
> * * * * *
>
> (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).
>
> * * * * *
>
> SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall

be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

U. S. GOVERNMENT PRINTING OFFICE: 1941



(13)

AUG 8 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 896.

AMOS G. McCAMPBELL, JR., - - Plaintiff-Appellant,

versus

THE WARRICH CORPORATION AND ROBERT EIGER, Doing Business Under the Name and Style of Eiger Realty Company, - Defendants-Appellees.

PETITION FOR REHEARING ON PETITION FOR CERTIORARI.

R. RUTHENBURG,
Washington Building,
Louisville, Kentucky,
Solicitor for Appellant.

LEWIS H. BARNES,
1343 H Street, N. W.,
Washington, D. C.
Resident Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

INDEX.

PAGE

Statement of Facts 2–17

Argument 2–17

Summary of Argument.

I. We claim the sale under case 16059, United States Circuit Court, was a nullity, because the Court was without jurisdiction to make the sale or to make same in the manner it was had, because 6–10–12

a. The infant vested remaindermen were not brought before the Court when the Receiver was discharged and, in contemplation of law, the property remained under Receivership at the time of said sale 6

b. Because under the judgment in said case 16059 any sale of the property would have had to be in its entirety and the Court ordering the sale in the manner shown worked a terial injury to the infant remaindermen 8

II. The sale being void for lack of jurisdiction to so sell and the remainder interests being entitled to subrogation to the lien of Mandell on the life estates and the property as a whole bringing Twenty Thousand Dollars ($20,000.00) more than the debt, interest, and costs, the amount owing by the infant remaindermen under the deed of James M. Bryant, August 28, 1866, executed subsequent to the mortgage foreclosure, the entire indebtedness of the said infants was paid and their remainder interests remained intact and free of encumbrance 8

PAGE

III. This action is for an ouster from the interest of the claimant of eleven-sixtieths (11/60ths) undivided interest in the property involved, wrongfully in the possession of the appellees and is not and cannot be a collateral attack upon a nullity 2

IV. The sale and the manner in which it was held, was fraudulent and collusive and the guardian ad litem, Hugh L. Mason, was a party to that fraud and represented the antagonistic interests of the infant remaindermen adverse to the life estates in the hands of Hyman, which were in lien under the judgment 3

V. The claimant has been the victim of fraudulent concealment on the part of the District Court of the United States for the Northern District of Illinois, Eastern Division in that, there have been and are still being, withheld from him, many important records in case 16059 and the claimant is utterly unable to obtain said records even after vigorous efforts, without the assistance of this Honorable Court. 3– 4

VI. The claimant in all justice should be given by proper proceedings, the right to obtain complete records in said case 16059 2–3–6

VII. Plaintiff had no right of action until the death of Mrs. Pattie B. Rowland, the last living life tenant, which occurred August 8, 1934, and the limitation is seven (7 years) from that period. . 5

VIII. It is impossible for claimant to show to this Honorable Court the complete aspect of title, as examined heretofore by experts, until the complete record is obtained of case 16059. 15

INDEX TO AUTHORITIES CITED.

	PAGE
Cahill Illinois Revised Statutes (1931), Limitations, Chapter 83, Section 4	5
Carr v. National Bank, etc., Co., 167 N. Y. 375, 60 N. E. 649, 82 A. S. R. 725	5
Florence v. Adams, 2 Rob. (La.) 556, 38 Am. Dec. 181	4
Gibbs v. Gerdes (1920, 291 Ill. 490, 126 N. E. 155)	5
Hall v. Payne, 224 Mass. 62, 112 N. E. 153	4
Herman v. Martineau, 1 Wis. 151, 60 Am. Dec. 368	5
McDonald v. Maltz, 94 Mich. 172, 53 N. W. 1058, 34 A. S. R. 331	5
Pacific Vinegar, etc., Works v. Smith, 145 Cal. 352, 78 Pac. 550, 104 A. S. R. 42	4
Ramspeck v. Pattillo, 104 Ga. 772, 30 S. E. 962, 69 A. S. R. 197, 42 L. R. A. 197	4
Rupp v. Sampson, 16 Gray (Mass.) 398, 77 Am. Dec. 416	4
Rice v. Davis, 136 Pa. St. 439, 20 Atl. 513, 20 A. S. R. 725	5
Shepherd v. Lanfear, 5 La. 336, 25 Am. Dec. 181	4
United States Rolling Stock v. Atlantic, etc., R. Co., 34 Ohio St. 450, 32 Am. Rep. 380	5
Wildberger v. Hartford Fire Ins. Co., 72 Miss. 338, 17 So. 282, 48 A. S. R. 725	5

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 896.

AMOS G. MCCAMPBELL, JR., - *Plaintiff-Appellant,*

v.

THE WARRICH CORPORATION AND ROBERT EIGER, DOING BUSINESS UNDER THE NAME AND STYLE OF EIGER REALTY COMPANY, - - - - - - *Defendants-Appellees.*

PETITION FOR REHEARING ON PETITION FOR CERTIORARI.

To the Honorable Supreme Court of the United States:

Comes the complainant, Amos G. McCampbell, Jr., and respectfully petitions this Honorable Court to grant a rehearing upon his petition for a writ of certiorari in the above entitled cause, and as the basis for same, respectfully represents the following vital elements, to-wit:

I.

The complainant has a constitutional right to proceed in *forma pauperis* unless and until it be shown that his statement of his status is incorrect.

II.

This is an action for ouster against the appellees from an undivided eleven-sixtieths (11/60ths) interest in the property described in the complaint.

III.

The complainant has been the victim of fraud, collusion, and concealment.

Until, since the denial of the writ of certiorari, the complainant made strenuous appeals to his Excellency the President of the United States, to the Attorney General of the United States, the Judiciary Committee of the United States Senate, and other influential individuals and organizations, he and his counsel were utterly unable to obtain from the United States District Court for the Northern District of Illinois, Eastern Division, the essential items in the old record of case 16059 of the Circuit Court of the United States, now said District Court.

Even then he was totally unable to obtain anything nearly approaching such a complete record, and many vital parts have not yet been obtainable.

When preparing the pleadings in this case, he was only able to obtain a few of said papers, of which we had photostatic copies made, which are filed as exhibits.

On July 2, 1940, he and his counsel were in Chicago and in company with a deputy of the United States District Court Clerk, they spent several hours in the

attic of the Federal Building trying to locate the books which would give the steps in said case, but in vain.

They then again called for the papers in said case and were given a bunch of papers entirely different from those they had seen before, but in said papers they obtained many salient facts which establish the same principles of law on which he has relied but forcefully accentuating them, which show that he was misled and deceived by the concealment and withholding of these records.

Even with the papers now found, which have only appeared since his appeal to the authorities referred to, the record is still far from complete, and in the interest of simple justice he now asks this Honorable Court to require produced to it a complete record in case 16059 of the Circuit Court of the United States, now the District Court of the United States for the Northern District of Illinois, Eastern Division, as only with such records can this Court get a clear conception of the fraud and deceit to which he has been subjected.

IV.

It is completely ascertained from the last records obtained that Hugh L. Mason, who was disbarred in 1895, represented Leila Bryant, Sallie L. McCampbell, and Pattie B. Rowland, in 1884 and as their counsel filed a supplemental bill on January 24, 1884, filed herewith as part hereof and marked for identification, Exhibit O.

He was not appointed as guardian *ad litem* for the infant remaindermen until January 6, 1886, as shown by the order of Court filed herewith as part hereof and marked as Exhibit P.

Nevertheless, he continued to act both for the life tenants mentioned, and also as guardian *ad litem* for the infant remaindermen and as will be seen, the interest of the remaindermen and those of the life tenants were absolutely adverse and Hugh L. Mason negotiated the sale of the life estates of Robert L. Hyman, Jr., and then, as guardian *ad litem* for the remaindermen, failed completely to protect their interests, thus perpetrating a fraud upon said infants, which vitiates the purported sale to Edward D. Mandell of the fee to the property described in the petition, excepting therefrom the life estates in the hands of Hyman, subject to the mortgage and likewise subject to the remainders.

> "In law as in morals, it may be stated that as a principle no servant can serve two masters, for either he will hate the one and love the other or else he will hold to the one and despise the other. Luke, xvi 13."
>
> Pacific Vinegar, etc., Works v. Smith, 145 Cal. 352, 78 Pac. 550, 104 A. S. R. 42; Ramspeck v. Pattillo, 104 Ga. 772, 30 S. E. 962, 69 A. S. R. 197, 42 L. R. A. 197; Florance v. Adams, 2 Rob. (La.) 556, 38 Am. Dec. 226; Shepherd v. Lanfear, 5 La. 336, 25 Am. Dec. 181; Hall v. Paine, 224 Mass. 62, 112 N. E. 153, L. R. A. 1917C, 737; Rupp v. Sampson, 16 Gray (Mass.), 398, 77 Am. Dec. 416; McDonald v. Maltz, 94 Mich. 172, 53 N. W.

1058, 34 A. S. R. 331; Wildberger v. Hartford Fire Ins. Co., 72 Miss. 338, 17 So. 282, 48 A. S. R. 558, 28 L. R. A. 220; Carr v. National Bank, etc., Co., 167 N. Y. 375, 60 N. E. 649, 82 A. S. R. 725; United States Rolling Stock Co. v. Atlantic, etc., R. Co., 34 Ohio St. 450, 32 Am. Rep. 380; Rice v. Davis, 136 Pa. St. 439, 20 Atl. 513, 20 A. S. R. 931; Herman v. Martineau, 1 Wis. 151, 60 Am. Dec. 368.

V.

No limitation would apply to the claim of the plaintiff except after the death of the last life tenant, Mrs. Pattie B. Rowland, on the 8th day of August, 1934, making the period of limitation expiring in seven years thereafter on August 7, 1941, Gibbs v. Gerdes, 291 Ill. 490, from which we quote as follows from page 496:

> "Possession of land by a tenant for life cannot be adverse to the remainderman or reversioner, and, if he conveys to a third person—the possession of the purchaser is not, during the continuance of the life estate, adverse to the remainderman or reversioner. The statute of limitations does not run against the remainderman or reversioner until after the life estate falls in, and it is only after the latter event occurs that the possession will be adverse to the remaindermen or reversioner. The possession of the tenant for life, or his vendee, during the continuance of the life tenancy, is, in contemplation of law, the possession of the remainderman or reversioner."

See Cahill, Illinois Revised Statutes (1931), Limitations, Ch. 83, Sec. 4.

Under the facts of the case, the Court did not have jurisdiction to sell the property under said mortgage as to the remainder interest because the infant remaindermen were not brought before the Court upon the occasion of the discharge of the Receiver and it did not have jurisdiction to sell the property under the judgment excepting as a whole and considered as a whole, it brought far in excess of the mortgage debt, interest and costs, leaving the remainder interest intact.

VI.

For the first time, on the 2nd of July, 1940, has the complainant been able to obtain from the said District Court of the United States a copy of the judgment rendered in case 16059, which explains fully the material of which the complainant had been kept in ignorance and the copy of said judgment is herewith filed as part hereof as Exhibit Q. The complainant had been informed and believed that James M. Bryant, together with his three daughters, had executed a mortgage to The Charter Oak Life Insurance Company in 1872 but was unable to find a record of same. He now has ascertained that the said judgment was based on a mortgage originally executed to secure a loan of $19,000.00 from Edward S. Isham and acknowledged by James M. Bryant on the 17th day of May, 1866. That mortgage was later assigned by said Isham to the Charter Oak Life Insurance Company, the assignment being dated the 11th day of February, 1867.

That mortgage was re-recorded together with the assignment thereof, on December 10, 1881, being withheld from record for ten (10) years or thereabouts, following the Great Fire in Chicago which occurred in the fall of 1871.

The photostatic copy of said mortgage and assignment is filed herewith and made a part hereof as Exhibit R.

VII.

We now have the report of the Master in Chancery, which is filed herewith and made a part hereof as Exhibit S. This brings the accounting down to March 30, 1893, and the balance for which the judgment was rendered is doubtless the costs in the proceedings.

VIII.

From the judgment (Exhibit Q) it will be seen that the judgment was rendered on January 6, 1886, in the sum of Twenty-five Thousand Eight Hundred Twenty-four Dollars and Thirty-three Cents ($25,824.33) to bear interest from said date at the rate of 6% per annum.

That judgment was rendered nearly three (3) years before the death of James M. Bryant, therefore the life estates provided in the deed executed by him on the 28th day of August, 1866, had not yet passed into the possession of the life tenants.

That judgment was against all of the property described in the complaint, including therefore, the inchoate life estates and remainders.

Said property therefore was in lien under said judgment **in its entirety.**

On page 5 thereof it will be seen that the Court provided, in the event of sale, under said judgment the following:

> "In default of so doing that all and singular the said premises mentioned and described in the said cross-bill of complaint and hereinafter described, or so much thereof as may be sufficient to satisfy the amount due to the complainant in said cross-bill as hereinbefore adjudged, together with the interest and costs in this cause, **and which may be sold separately without material injury to the parties interested."**

We believe that the reference "which may be sold separately without material injury to the parties interested" refers to sale of only part of the physical property under mortgage sufficient to satisfy the judgment, and not to the separate interests of any of the defendants. There was thereon a four-story building and said property was indivisible.

That certainly would not by any means permit the exception of the life estates, thus casting the entire burden upon the remainders and thus permitting the life estates purchased by Hyman, which rested under the lien, as well as every other portion of the property,

to obtain a gross and fraudulent advantage, at the expense of the said infants, a **"material injury"** to them.

From the terms of the judgment we claim that it was gross fraud on the part of the Court and the guardian *ad litem* as well as Hyman and Mandell to undertake to sell said property in any such manner as was provided by the order of sale, being, first, the fee excepting the life estates; second, if that realized insufficient, to include the life estates; three, if that still was insufficient then to sell all interests.

According to our understanding, that order only meant that it was the intention of the Court to defer the remainders until the third provision, and in consequence we maintain the remainders were never sold, but if they were, it was fraud of the most flagrant character upon said infants, particularly upon the part of Hugh L. Mason, who had been intrusted with the sacred duty of protecting the interests of those children, when he, as the records show, utterly failed to protect them as he should have done, by insisting upon the sale of the life estates and if they were to be separated in any way from the remainders, then they should have been the first part to be sold, instead of preferring them by exception and casting the entire burden upon the infants' interests.

IX.

When the records in said case 16059 are complete, they will show that within six (6) months prior to the death of James M. Bryant, he sought permission of the

Court to sell this property for One Hundred Ten Thousand Dollars ($110,000.00) but was refused such permission because that amount was not as much as two-thirds (2/3rds) of the value thereof.

No appraisal was had as a basis for the sale in November, 1893.

The said property was assessed at that time by Cook County, Illinois, valued for One Hundred Seventy-six Thousand Dollars ($176,000.00).

Notwithstanding the above facts, which will be shown when the record is complete in case 16059, the Court permitted this property to be sold for the sum of Thirty-eight Thousand and Six Hundred Forty-seven Dollars and Ninety Cents ($38,647.90) and as we shall show under the conditions of the sale, no redemption was possible as provided for by the law of Illinois. The life estates gave Hyman possession indefinitely, and the Court was powerless to deliver possession.

The Receiver in charge of said property was Cyrus Bentley, as shown on page 6 of the bill of Edward D. Mandell filed herewith as part hereof and marked Exhibit T.

Said Receiver was discharged as shown therein, on or about the 24th of March, 1886 (page 6).

When the said Receiver was discharged the infant remaindermen were not brought before the Court on said proceeding and therefore we claim that the discharge of the Receiver was vitiate, null and void and that in contemplation of law. The property was in the

hands of a Receiver of the Court continuously until the purported sale thereof in November, 1893.

Such being the situation, all of the net income from said property should be applied toward the liquidation of the judgment lien and the fact that such was not done, was a further fraud upon the interests of the infant remaindermen.

In further illustration, the lease to Murphy (Exhibit XV) provides the net rental of $7,000.00 per annum for One Hundred Ninety-nine years (199).

Assuming a 5% net return, would make the value of said property One Hundred Forty Thousand Dollars ($140,000.00).

To obtain that lease Murphy paid Eighty Thousand Dollars ($80,000.00) (Exhibit 15).

In turn Murphy sold the lease to Eiger for Ninety-five Thousand Dollars ($95,000.00) (Exhibit 18).

This would indicate a value of at least Two Hundred Twenty Thousand Dollars ($220,000.00).

There was a four-story building upon this property worth at least Twenty-five Thousand Dollars ($25,000.00), making a total value of Two Hundred Forty-five Thousand Dollars ($245,000.00).

As heretofore shown the life estates were subject to the judgment lien and so remained in the hands of Hyman and when Mandell purchased the life estates in turn from Hyman, they were likewise in lien under said judgment and being so, we claim that the amount paid therefor, by Mandell, Twenty Thousand Dollars ($20,000.00), must be credited upon the judgment with remainders intact and money due them.

The judgment having been rendered against the property in its entirety, during the lifetime of James M. Bryant, the life estates, when coming into the possession of the three daughters, were subject to the lien of that judgment and in addition thereto, all costs and interest accruing thereon.

Such being the case, in all fairness, equity and justice there must be credited as to the infant remaindermen the entire sum realized consisting of the Thirty-eight Thousand, Six Hundred Forty-seven Dollars and Ninety Cents ($38,647.90) paid by Mandell plus the Twenty Thousand Dollars ($20,000.00) which he paid for the life estates in lien under the judgment, making a total sum paid for this property as a whole, which is the only way the judgment can be considered, Fifty-eight Thousand Six Hundred Forty-seven Dollars and Ninety Cents ($58,647.90) which exceeds by Twenty Thousand Dollars ($20,000.00) the amount of the judgment, interest and costs.

The judgment being based upon a mortgage antedating the deed of August 28, 1866, the interests of the life tenants and the remaindermen as to the liability and lien of the said judgment were **joint** and **successive,** but not **several.**

When Mandell bid the full amount of his judgment, interest and costs, he thereby paid the entire debt of James M. Bryant up to the time of his death, and in addition thereto he paid the entire debt of the life tenants and also the Nineteen Thousand Dollars ($19,000.00) principal of the mortgage.

As the life estates were in lien to Mandell under the judgment the infant remaindermen were entitled to and must be subrogated to Mandell's lien thereon, his debt having been paid at the expense of the remainders alone.

That anomalous situation was brought about through the fraudulent collusion of Hugh L. Mason, guardian *ad litem,* Elijah B. Sherman, Master in Chancery, Robert W. Hyman, Jr., and Edward D. Mandell, all of whom conspired to defraud the infant remaindermen. We have just learned of proceedings in the State courts of Illinois in support of this and are waiting copies.

It is thus seen, as the property was indivisible, that the Court was without any jurisdiction to sell said property, except as a whole and in its entirety and when the Court undertook to reserve from sale the life estates in the hands of Hyman, thus casting the whole burden upon the remaindermen, that was a fraud upon the remaindermen and exceeded the jurisdiction of the Court, which rendered such purported sale null and void.

In addition to that, the remaindermen having not been brought before the Court on the discharge of the Receiver, is an additional violation of the law and a further fraud upon the remaindermen which also would nullify the purported sale.

In addition to these matters the fraudulent representation by Hugh L. Mason of the violently antagonistic interests, under the circumstances of this case, of

the life estates and the remainders, both represented by Hugh L. Mason, constituted a further fraud, of the most flagrant nature, upon the remainders.

Under all these conditions we cannot conceive that the Courts can possibly sanction such gross fraud as has been shown.

X.

In view of the fraudulent concealment from and deception upon the complainant, preventing him, until the 2nd day of July, 1940, as shown, from ascertaining the facts affecting his interest, we earnestly adjure this Honorable Court, not only to grant a rehearing for his petition for a writ of certiorari, but to order that the entire record in case 16059 of the Circuit Court be produced herein and that the complainant be granted a rehearing, as the property realized, not only in excess of the amount of the debt, interest and costs, but said amount in total was not one-fourth (1/4th) of the real value of said property, at the time of the alleged sale, as there was a four-story building thereon and the assessed valuation was undoubtedly less than the saleable value thereof and that shortly prior to his death, James M. Bryant would have had a sale of the said property, even under the pressure conditions shown by the judgment, for One Hundred Ten Thousand Dollars ($110,000.00) when it was doubtless worth more than twice that sum and by the machinations shown, the interest of the infants, constituting their patrimony in said property, were utterly and ruth-

lessly and fraudulently sacrificed, by the Court, without any attempt to protect them, by the guardian *ad litem,* Hugh L. Mason, who was afterwards disbarred. Whether his disbarment was in consequence of the ruthless sacrifice of the interest of these infant remaindermen, we have not been able to ascertain.

However, appellees are unable to obtain a loan on the property, because of claimant's interest.

Experts who have examined this title will make affidavits only when they can get the complete record of case 16059.

XI.

In conclusion we quote from the deed of James M. Bryant, August 28, 1866, the provisions in regard to the remainder interests showing conclusively that they were and are vested remainders:

> "To have and to hold to the said parties of the second part, after the death of the said party of the first part, for and during the lives respectively of said parties of the second part and to the issue or **heirs of the bodies,** respectively, **of said parties of the second part,** in fee simple, said issue or heirs of the bodies of said parties of the second part, **taking per stirpes;** provided, that if any one or more of the said parties of the second part shall die **without leaving issue or heirs of his or her body;** then his, her, or their portion, or portions are to survive and go to and be held by the surviving party or parties of the second part respectively for life or lives and then to the issue or heirs of the body of said survivor or survivors in

fee simple; and **provided further that if all of said parties of the second part shall die without leaving issue or heirs of their bodies, then each and all of said parcels of land or lots shall revert to the heirs of the party of the first part;"**

While awkwardly expressed, the above provision in event of any of the life tenants dying without issue or heirs of his or her body, is solely a provision for reversion.

The infant children of Mrs. Sallie B. McCampbell became vested remaindermen upon the birth of Roberta McCampbell, the oldest child, in 1876, and successively thereafter upon the birth of each of the others.

Such vested remainder interest was defeasible only in the event of the death of any of them, prior to the death of their mother, in which event, if that vested remainderman left no issue, his or her remainder would pass to his or her brothers and sisters, members of the class.

If such a remainderman died previous to the mother, leaving a **natural** child, such child would acquire a contingent remainder interest as soon as born, which, in the event of its parent dying before Mrs. McCampbell, would then immediately become a vested remainder in said child; this is only because such child would be **an heir of the body** of Sallie B. McCampbell.

On the other hand, if one of her issue died prior to her death, leaving an **adopted** child, with full right of inheritance, but no heritable blood of Mrs. Sallie B. McCampbell, such child could take no part of the property in question, because the deed provides that it

would only go to the issue of the **bodies** of the **life tenants** or to **heirs** of **their** bodies, *per stirpes.* Such adopted child, despite its right of inheritance from the adoptive parent, would not be an heir of the body of the life tenant, nor would it be *per stirpes.*

In view of the foregoing, we earnestly petition this Honorable Court in the interests of justice, to grant to the complainant a rehearing in this matter and that said hearing be an oral hearing before the entire Court, with permission to present this matter in its true light by counsel, with the entire record in said case 16059, before this Honorable Court, which we have been unable to obtain and to which we are entitled, to the end that this Honorable Court may have a true and complete picture before it.

The complainant asks the Court either to grant a writ of certiorari setting forth its written opinion based upon the new material herein and conforming the opinion thereto or to remand this cause to the Circuit Court of Appeals, with instructions to permit an amendment of the pleadings conforming with this newly discovered material and to have brought before said Court the entire record on the old case 16059.

Respectfully submitted,

R. RUTHENBURG,
Washington Building,
Louisville, Kentucky,
Solicitor for Appellant.

LEWIS H. BARNES,
1343 H Street, N. W.,
Washington, D. C.
Resident Counsel.

(13)

SEP 11 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 896

AMOS G. McCAMPBELL, JR.,

Petitioner,

vs.

THE WARRICH CORPORATION AND ROBERT EIGER, DOING BUSINESS UNDER THE NAME AND STYLE OF EIGER REALTY COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ANSWER BY RESPONDENTS TO PETITIONER'S PETITION FOR REHEARING ON DENIAL OF HIS PETITION FOR WRIT OF CERTIORARI.

HAROLD L. REEVE,
ELMER M. LEESMAN,
Attorneys for Respondents,
69 West Washington Street,
Chicago, Illinois.

THE BUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

INDEX.

	PAGE
Summary of Argument	1
Argument	2
I. Petitioner errs in his statement that he is entitled to apply for writ of certiorari as a matter of constitutional right	2
II. Petitioner has set forth none of the reasons which must be set up to entitle him to the writ of certiorari	3
III. Petitioner now attempts to supply matter, nowhere apparent in the record, as inducement to this court to grant him a writ of certiorari. That matter cannot be considered by this court. Furthermore, as shown above, even if considered, it would furnish no ground for granting the writ.	4
Conclusion	5

Cases Cited.

Baldwin v. Traveling Men's Association, 283 U. S. 522, 525 (1931)	5
Burnet v. Commonwealth Imp. Co., 287 U. S. 415, 418 (1932)	4
District of Columbia v. Clawans, 300 U. S. 617, 627 (1937)	3
Edward Hines Trustees v. Martin, 268 U. S. 458, 464, 465 (1925)	4
General Pictures Co. v. Electric Co., 304 U. S. 175, 178 (1938)	5
Magruder v. Drury, 235 U. S. 106, 112, 113 (1914)	4
Ohio v. Akron Park District, 281 U. S. 74, 80 (1930)	3
Wettrick v. Martin, 181 Ill. App. 94, 97, 98 (1913)	3
Wheeler Lumber Co. v. United States, 281 U. S. 572, 576 (1930)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 896.

AMOS G. McCAMPBELL, JR.,

Petitioner,

vs.

THE WARRICH CORPORATION AND ROBERT EIGER, DOING BUSINESS UNDER THE NAME AND STYLE OF EIGER REALTY COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ANSWER BY RESPONDENTS TO PETITIONER'S PETITION FOR REHEARING ON DENIAL OF HIS PETITION FOR WRIT OF CERTIORARI.

Summary of Argument.

I. Petitioner is not entitled to present a petition for writ of certiorari by constitutional right. (*Infra*, page 2.)

II. Petitioner has set forth none of the reasons which must be set up to entitle him to a writ of certiorari in this cause. (*Infra*, page 3.)

III. Petitioner attempts by his petition for rehearing to supply matter not in the record. (*Infra*, page 4.)

IV. There must be an end to litigation some time. (*Infra*, page 5.)

Argument.

MAY IT PLEASE THE COURT:

The Court will observe that the petition for rehearing which petitioner has filed, sets up two propositions in support of the prayer for reconsideration by this Court of the petition heretofore filed in this Court by the petitioner. Those propositions are:

1. That the petitioner is entitled as a matter of constitutional right to apply for a writ of certiorari as a pauper, and

2. That he was a victim of fraud, collusion and concealment in the old foreclosure suit of 1893, which he seeks to assail by the collateral proceeding which he now asks this Court to entertain by writ of certiorari. (The Court will note that to that end he sets up matter in his petition for rehearing in an effort to supply what nowhere appears in the record.)

I.

Petitioner Errs in His Statement That He Is Entitled to Apply for Writ of Certiorari as a Matter of Constitutional Right.

He has had his day in court. In the foreclosure suit he was made a party and properly served with process. See pages 8 and 9 of respondents' "Brief Opposing Petition for Writ of Certiorari." And in this case he was

given a hearing both in the District Court and in the Circuit Court of Appeals.

There is no constitutional right to an appeal, and that is all that petitioner seeks by his petition for writ of certiorari. *District of Columbia* v. *Clawans*, 300 U. S. 617, at page 627 (1937); *Ohio* v. *Akron Park District*, 281 U. S. 74, at page 80 (1930).

II.

Petitioner Has Set Forth None of the Reasons Which Must Be Set Up to Entitle Him to the Writ of Certiorari.

The Court is respectfully asked to note again the matter set forth at pages 7 and 8 of respondents' "Brief Opposing Petition for Writ of Certiorari." The Court in the old foreclosure suit, the decree in which it is the effort of petitioner by this proceeding to set aside, had jurisdiction of petitioner. Petitioner's contention that he was imposed upon because, so he says, the guardian *ad litem* appointed for him was solicitor for the life tenants, sets up no fraud going to the jurisdiction of the court. At most, even if true, it sets up an irregularity, only, in the proceedings, and such is not available on collateral attack. The authorities upon that are fully set forth at the top of page 16 of respondents' "Brief Opposing Petition for Writ of Certiorari." On collateral attack, the absence of a guardian *ad litem* altogether would not have affected the integrity of the decree entered in that cause. *Wettrick* v. *Martin*, 181 Ill. App. 94, 97, 98 (1913).

III.

Petitioner Now Attempts to Supply Matter, Nowhere Apparent in the Record, as Inducement to This Court to Grant Him a Writ of Certiorari. That Matter Cannot Be Considered by This Court. Furthermore, as Shown Above, Even if Considered, It Would Furnish No Ground for Granting the Writ.

A. *This Court is prevented by the Constitution from acting as a court of original jurisdiction in the matter which petitioner seeks to bring before it. It can act only upon the record brought before it from the Circuit Court of Appeals.*

That is well shown in the case of *Edward Hines Trustees* v. *Martin,* 268 U. S. 458, at pages 464 and 465 (1925), where this Court said:

> "This court is a court of review and it will not consider questions not raised or disclosed by the record brought to it for review and which were not considered by the courts below."

It is emphasized in the case of *Wheeler Lumber Co.* v. *United States,* 281 U. S. 572, at page 576 (1930), where this Court said:

> "There are two reasons why a certification by that court [the court of claims] which embraces the whole case, cannot be entertained by this Court. One is that to accept such a certification and proceed to a determination thereon, in advance of a decision by that court, would be an exercise of original jurisdiction by this Court contrary to the constitutional provision which prescribes that its jurisdiction shall be appellate in all cases other than those affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party."

To the same effect are *Burnet* v. *Commonwealth Imp. Co.,* 287 U. S. 415, at page 418 (1932); *Magruder* v. *Drury,* 235 U. S. 106, at pages 112 and 113 (1914).

Furthermore, this matter is set up by the petitioner for the first time in his petition for rehearing, which partakes of the nature of a supporting brief, and a supporting brief is no part of the petition for certiorari. *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, at page 178 (1938).

Conclusion.

This controversy was fully disposed of over forty years ago in a foreclosure proceeding in which petitioner was made a party and brought in by proper process. As conclusively shown in respondents' "Brief Opposing Petition for Writ of Certiorari," at pages 11 to 13 thereof, petitioner has failed to come in in apt time to review the decree in that case, and as shown at pages 13 to 20 of that brief, even if petitioner had come in within apt time, he could not have disturbed that decree. And so in conclusion it would seem that the language of *Baldwin* v. *Traveling Men's Association*, 283 U. S. 522, at page 525 (1931), is most appropriate here, thus:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties."

Respectfully submitted,

HAROLD L. REEVE,
ELMER M. LEESMAN,
Attorneys for Respondents, The Warrich Corporation and The Eiger Realty Company,
69 West Washington Street,
Chicago, Illinois.

In the Supreme Court of the United States

OCTOBER TERM, 1939.

No. 896.

AMOS G. McCAMPBELL, JR.,
Petitioner,

vs.

THE WARRICH CORPORATION AND ROBERT EIGER,
Doing Business Under the Name and Style of
Eiger Realty Company,
Respondents.

MOTION FOR CERTIORARI TO SUPPLY OMISSIONS FROM RECORD AND FOR ORDER FOR FURTHER PROOF.

Petitioner moves this Honorable Court for certiorari to supply omissions from the record herein for the reason that, through no fault of petitioner herein, originals of important papers including pleadings, reports, and orders in *Bryant v. Charter Oak Life Insurance Company,* heretofore pending in the United States Circuit Court for the Northern District of Illinois, Northern Division thereof, as cause No. 16,059, judgment whereof is herein attacked, were missing from the Court file of said cause until the record had been completed in the District Court. Some of said documents were returned to the Court file and certified copies have been heretofore submitted at Exhibits O to S both inclusive, and others are submitted herewith by certified photostatic copies marked "Exhibit A 1." Of such papers the following papers heretofore submitted as a part of Exhibits O to S, both inclusive, or submitted herewith as a part of Exhibit A 1 were not available to tender as exhibits in the District Court:

*	1/2/1884	Supplemental Bill.
**	4/30/1885	Original Answer.
**	12/23/1885	Order.
*	1/6/1886	Order and Final Decree.
*	8/11/1892	Bill, Sup. Cross Bill.
**	8/16/1892	Draft Order Granting Leave to File Bill.
**	11/25/1892	Replication.
**	11/25/1892	Answer of Minor Defendants.
**	6/22/1893	Draft of Decree of Sale.
*	10/2/1893	Objection to Report of Sale.
**	12/2/1893	Master's Report of Sale.
**	4/4/1895	Master's Report.

Note: * Papers heretofore tendered as Exhibits O to S inclusive.

** Papers tendered herewith as Exhibit A 1.

In support of this motion petitioner submits the affidavit of R. Ruthenberg dated September 30, 1940.

Petitioner states that by reason of the aforesaid such omissions could not have been cured before the record was filed.

Petitioner respectfully represents that said pleadings, reports and orders are essential to a fair, complete and impartial consideration by this Honorable Court of Petitioner's Motion for Rehearing pending herein and that said documents together with documents heretofore admitted as a part of transcript of record herein will show the facts stated in brief filed herewith.

Petitioner further moves this Honorable Court for an order for further proof, as provided within Rule 15 of the Rules of the Supreme Court of the United States.

CARMI A. THOMPSON,

ORVILLE SMITH,

Attorneys for Petitioner.

STATE OF OHIO,
COUNTY OF CUYAHOGA, SS.

Amos G. McCampbell, Jr., petitioner herein, being first duly sworn at law, deposes and says that he knows the facts upon which the above motion is founded and that the same are true as he verily believes.

AMOS G. MCCAMPBELL, JR.

Sworn to before me and subscribed in my presence this 4th day of October, 1940.

ETHEL CUNIO,

(Seal) *Notary Public in and for Cuyahoga County, Ohio.*

My Commission Expires Mar. 25, 1943.

OCT 5 1940
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1939.

No. 896.

AMOS G. McCAMPBELL, JR.,
Petitioner,

vs.

THE WARRICH CORPORATION AND ROBERT EIGER,
Doing Business Under the Name and Style of
Eiger Realty Company,
Respondents.

On Petition for Rehearing
Of Petition for Writ of Certiorari to
The United States Circuit Court of Appeals
For the Seventh Circuit.

BRIEF IN SUPPORT OF PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF MOTION TO SUPPLY OMISSIONS FROM THE RECORD.

Carmi A. Thompson,
Orville Smith,
Attorneys for Petitioner.

The Gates Legal Publishing Co., Cleveland, Ohio

INDEX.

Jurisdiction of this Court 1

Question Presented 2

Statement of Facts 2

Argument 4

TABLE OF AUTHORITIES.

Cases.

Bryant vs. Charter Oak Life Insurance Company, 24 Fed. Rep. 771 (1885) 3

Camp etc. v. Grass, 250 U. S. 308 (1919) 7

C. P. & St. L. Ry. Co. v. Vaughn, 206 Ill. 234, 240 (1903) 5

Gibbs vs. Gerdes, 291 Ill. 490 6

The Steam Tug R. S. Mabey etc. v. Atkins et al., etc., 13 Wall. 738 (1871) 8

Morgan v. Curtenius, 19 How. 8 (1857) 7

Patterson v. Alabama, 294 U. S. 600 (1935) 7

Watts, Watts and Company, Limited v. Unione Austriaca Di Navigazione, etc., 248 U. S. 9 (1918) .. 7

Texts.

14 *American Jurisprudence*, page 461 8

Jones on Mortgages, Vol. 3, page 650 6

Statute.

Illinois Annotated Statutes, Chapter 83, Section 4 5

Rule.

Rule 38, Sec. 5(b) of the Rules of the Supreme Court of the United States 1

In the Supreme Court of the United States

OCTOBER TERM, 1939.

No. 896.

AMOS G. McCAMPBELL, JR.,
Petitioner,

vs.

THE WARRICH CORPORATION AND ROBERT EIGER,
Doing Business Under the Name and Style of
Eiger Realty Company,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF MOTION TO SUPPLY OMISSIONS FROM THE RECORD.

JURISDICTION OF THIS COURT.

Petitioner represents that writ of certiorari should be granted herein for the reason that this case falls within the purview of Rule 38, Sec. 5(b) of the Rules of the Supreme Court of the United States as follows:

"Rule 38. * * *

5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:

* * * * *

(b) Where a Circuit Court of Appeals has * * * so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

QUESTION PRESENTED.

Remainders having been sold in foreclosure proceedings instituted on a mortgage of the fee executed by the owner prior to the conveyance creating such remainders and subjecting them to life estates, and the interests of the life tenants having been exempted from the foreclosure sale, and the remaindermen who were infants having been represented by a guardian *ad litem* who also represented the life tenants in the same proceedings, should this foreclosure sale be set aside in a separate proceeding brought for that purpose by one of the infant remaindermen?

STATEMENT OF FACTS.

The realty in question here was conveyed by deed of James M. Bryant in 1866, and in said deed the following interests were created:

(1) Life estate in grantor;

(2) Life estate in children of grantor after his death; and

(3) Remainder interest in heirs of the bodies of grantor's children. (R. p. 31.)

At the time of the execution of said deed the real estate conveyed thereby was subject to a mortgage (Exhibit R) and in said deed reference was made to encumbrances and a recital stated that the conveyance was subject to such encumbrances.

The sale as to which complaint is made herein was had in foreclosure of this mortgage, in the Circuit Court of the United States for the Northern District of Illinois, Northern Division. In the original decree in the said proceed-

ings it was held that the entire property should be subjected to the payment of the debt. This appears in *Bryant vs. Charter Oak Life Insurance Company*, 24 Fed. Rep. 771, 773 (1885). This decision related to the claim of the life tenants that their interests were not subject to the mortgage. An appeal from this decision was dismissed by this Court, 136 U. S. 633 (1890). The proceeding below then went forward in foreclosure.

In the later proceedings the purchaser of the mortgage, Edward D. Mandell, filed a supplemental bill (Exhibit Q) and the purchaser of the life estates, Robert W. Hyman, filed an answer in the nature of a cross-petition (Exhibit A1, p. 16) stating that the claims of the infant remaindermen were separate from his interest as owner of the life estates and should be sold and be redeemable separately. The guardian *ad litem* did not answer this claim of the owner of the life estates.

From the records of the foreclosure proceedings it appears that the guardian *ad litem* for the infant remaindermen, Hugh L. Mason, had represented the life tenants prior to the sale of their interests to Hyman (Exhibit A1, p. 10) and had received a fee allowed by the court for said services. (Exhibit A1, p. 12.)

Under an order of sale preceding the final order under which the sale was made and confirmed (Exhibit A1, p. 22), the property was ordered sold exempting and excepting the life estates, and in the sale under that order a bid was received in excess of thirty-eight thousand dollars, being sufficient to pay the debt and the costs. The guardian *ad litem* for the infant remaindermen objected to the sale because it was made at the Federal Building instead of being made at the County Court House as provided by law. (Exhibit S.) The guardian *ad litem* did not object that his wards had been deprived of their interests while permitting the owner of the life estates to retain his interest.

This sale was set aside and the order was corrected to provide the proper place of sale but the final order under which the final sale was made contained the provision that the life estates were to be exempted from sale. (R. p. 50.) The legal notice and advertisement on this final order of sale provided for the sale of the property "with all and singular the tenements, hereditaments, and appurtenances thereunto belonging" (R. p. 26), and no exceptions were contained in the advertisement.

Sale of the premises was made under this final order to Edward D. Mandell, the owner of the mortgage (Exhibit A1, p. 26), and he purchased the life estates from Robert W. Hyman a short time later for a recited consideration of twenty thousand dollars. (Opinion C. C. A.)

The petitioner is a remainderman under said Bryant deed. He became of age August 16, 1903, and had been adjudged insane on May 23, 1901. He was adjudged of sound mind on April 3, 1936. The last surviving life tenant, Pattie B. Rowland, died August 8, 1934. (Opinion C. C. A.)

At the time of instituting the present proceedings in the United States District Court, many of the papers in the said mortgage foreclosure proceedings were missing from the files of the office of the Clerk of that Court. Only after repeated demands were some of those papers returned to the files. The statement included in petitioner's motion indicates some of the papers which were thus missing and have been returned, and petitioner believes that these papers are necessary fully to support his claims.

ARGUMENT.

The opinion of the Circuit Court of Appeals in this cause states that the Bryant deed was executed on August 28, 1866, and that in January, 1872, Bryant executed a mortgage which was afterwards foreclosed and the property sold. The fact is that the mortgage had been executed before the Bryant deed and was one of the encumbrances mentioned in the deed as being an existing lien on the property.

With respect to the exemption of the life estates from the mortgage foreclosure sale, the opinion of the Circuit Court of Appeals states as follows:

> "Under this decree the property, except the life estates of the daughters, was sold to Mandell for the amount of the judgment on November 18, 1893, and on February 27, 1895, the master's deed therefor was delivered to Mandell. * * *
>
> "Mandell was foreclosing his mortgage and he purchased at the foreclosure sale. It is true that he purchased only the interest which was sold, but that was the entire interest except the life estates which Hyman owned."

The opinion then states that the remaindermen did not purchase the property and took no action whatever. Certainly the remaindermen could not reasonably have been expected to buy their own interests, as the purchaser of the life estates was permitted to retain possession of the property and thus the income from the property could not be used for the purposes of redemption. It is clear that the remaindermen were thus fraudulently deprived of their rights and neither the guardian *ad litem* who had previously represented the life tenants in the same proceeding nor the court protected the infant remaindermen against this injustice.

The petitioner had no right of action until the death of the last of the life tenants in 1934, and the limitation period under Chapter 83 of the Illinois Annotated Statutes, Section 4, heretofore quoted,* is seven years.

Supplementing the briefs heretofore filed by counsel for the petitioner, we wish to cite the decision of the Supreme Court of Illinois in *C. P. & St. L. Ry. Co. v. Vaughn*, 206 Ill. 234, 240 (1903), in which the following appears:

> "The possession of land by a tenant for life cannot be adverse to the remainderman or reversioner; and if he conveys to a third person by words purporting to pass the absolute property, the possession of the

---

* Page 22, Brief in Support of Petition for Writ of Certiorari.

purchaser is not, during the continuance of the life estate, adverse to the remainderman or reversioner. The Statute of Limitations does not run against the remainderman or reversioner, until after the life estate falls in, and it is only after the latter event occurs, that the possession will be adverse to the remainderman or reversioner. The possession of the tenant for life, or his vendee, during the continuance of the life tenancy, is, in contemplation of law, the possession of the remainderman or reversioner. The latter cannot, during the life of the person for whose life the life estate is, bring an action against the person in possession under such life tenancy to recover possession of the premises. 'No laches can be imputed to one who has no remedy or right of action, and to hold the bar of the statute could run against the title of a person so circumstanced, would be subversive of justice and would be to deprive such person of his estate without his day in court.' (*Turner v. Hause*, 199 Ill., 464; *Mettler v. Miller*, 129 id. 630; *Rohn v. Harris*, 130 id. 525; *Higgins v. Crosby*, 40 id. 260.)"

To the same effect is *Gibbs vs. Gerdes*, 291 Ill. 490.

The rule as to an original action is stated in *Jones on Mortgages*, Vol. 3, at page 650, as follows:

> "A sale under a decree of foreclosure may be set aside by a bill in equity brought for the purpose, when the sale has been fraudulently conducted to the prejudice of the plaintiff even when he might have a remedy by motion in the original suit."

As to an original proceeding when the rights of third persons have intervened, this author says at page 651:

> "When the rights of third persons have accrued, some original proceeding is necessary in which these rights may be tried in the ordinary way; they can not be adjudicated in a summary manner upon motion. They must in some way be brought into court, and given an opportunity to be heard."

No question of rights of purchasers without notice is presented here, as the case below was dismissed on motion.

Petitioner, by his counsel, represents to this Honorable Court that certiorari to supply omissions from the record should be granted.

In *Morgan v. Curtenius,* 19 How. 8 (1857), this Court issued certiorari, directed to the Judges of the Circuit Court of the United States for the District of Illinois, directing it to supply a certain omission and return a full and correct transcript to this Court.

In *Watts, Watts and Company, Limited v. Unione Austriaca Di Navigazione, etc.,* 248 U. S. 9 (1918), this Court said in part in its opinion at page 21 as follows:

> "This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require. *Butler v. Eaton,* 141 U. S. 240, 35 L. ed. 713, 11 Sup. Ct. Rep. 985; *Gulf, C. & S. F. R. Co. v. Dennis,* 224 U. S. 503, 506, 56 L. ed. 860, 861, 32 Sup. Ct. Rep. 542. And in determining what justice now requires, the court must consider the changes in fact and in law which have supervened since the decree was entered below."

This Court stated the following principle of decision in its opinion in *Patterson v. Alabama,* 294 U. S. 600 (1935) at page 607:

> "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered."

This Court held in part in *Camp etc. v. Grass,* 250 U. S. 308 (1919), at page 318, as follows:

> "In cases coming from Federal courts, the Supreme Court is given by statute full power to enter such judgment or order as the nature of the appeal

or writ of error (or certiorari, Sec. 240 of the Judicial Code [36 Stat. at L. 1157, chap. 231, Comp. Stat. 1916, Sec. 1217, 5 Fed. Stat. Anno. 2d ed. p. 854]) requires. Revised Statutes, Sec. 701, Comp. Stat. 1916, Sec. 1669, 6 Fed. Stat. Anno. 2d ed. p. 224, Circuit Court of Appeals, Act of March 3, 1891, chap. 517, Sec. 11, 26 Stat. at L. 826, 829."

In denying appellants' motion for commission to take the testimony of certain witnesses under facts in no way comparable to the present operative facts, this Court made the following statements relating to such motion in *The Steam Tug R. S. Mabey etc. v. Atkins et al., etc.*, 13 Wall. 738 (1871), at pp. 740-741:

> "Application for the same purpose as that described in the motion (motion for commission to take the testimony of certain witnesses) was made to this court by the appellants, on a prior occasion during the present term of the court; but it was refused, as no excuse was shown, in the petition or accompanying papers, why the witnesses were not examined either in the district or circuit courts, and the court said some excuse should be shown, satisfactory to this court, for the failure to examine them in the courts below; such as that the evidence was discovered when it was too late to procure such examination, or that the witnesses had been subpoenaed and failed to appear, and could not be reached by attachment, and the like." See also 14 *American Jurisprudence*, page 461.

Here the evidence was not available.

Summarizing, we submit that the purported sale under said foreclosure proceedings was a nullity, as the Court was without jurisdiction to exempt the interests of part of the owners of the real estate while attempting to sell the interests of the other owners; that this action is for a declaration of petitioner's title to eleven-sixtieths of the property involved and should not be considered as a collateral attack upon a procedure which is null and void; that the fraud of the guardian *ad litem* in representing con-

flicting interests as well as the discrepancy between the advertisement and the sale of the property clearly support petitioner's claim that the attempted sale was void and of no effect whatsoever and that the petitioner should be granted the right to complete the record, which will fully show petitioner's rights.

Respectfully submitted,

CARMI A. THOMPSON,
ORVILLE SMITH,
Attorneys for Petitioner.

(16)

FILED
OCT 9 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 896

AMOS G. McCAMPBELL, JR.,

Petitioner,

vs.

THE WARRICH CORPORATION AND ROBERT EIGER, DOING BUSINESS UNDER THE NAME AND STYLE OF EIGER REALTY COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SUGGESTIONS BY RESPONDENTS IN OPPOSITION TO MOTION OF PETITIONER FOR CERTIORARI TO SUPPLY OMISSIONS FROM RECORD, AND OPPOSING BRIEF TO BRIEF IN SUPPORT OF PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF MOTION TO SUPPLY OMISSIONS FROM THE RECORD.

HAROLD L. REEVE,
ELMER M. LEESMAN,
Attorneys for Respondents,
69 West Washington Street,
Chicago, Illinois.

THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

INDEX.

PAGE

Summary of Argument..... 1

Argument 3

I.

Petitioner is not entitled to introduce, for the first time, in the Supreme Court of the United States, matter not in evidence in the *nisi prius* court..... 3

II.

Petitioner has shown no diligence in his failure to introduce such evidence before the *nisi prius* court.... 6

III.

The alleged new evidence could not change the result.. 7

IV.

The rules applicable to the time within which a remainderman may oust a disseisor do not apply to an effort by a party to a suit, even though an infant, to set aside the decree entered in that suit..... 7

V.

Petitioner, even with the alleged new evidence, has still not shown a case of the type which the Supreme Court of the United States will entertain on petition for certiorari 8

Conclusion 9

Cases Cited.

Camp v. Grass, (1919) 250 U. S. 308 5

McCampbell v. Warrich Corporation, (C. C. A. 7th, 1940) 109 Fed. (2d) 115 8

M'Leod v. City of New Albany, (C. C. A. 7th, 1895) 66 Fed. 378, 381, 382 6

Morgan v. Curtenius, (1857) 60 U. S. (19 How.) 8 4

Patterson v. Alabama, (1934) 294 U. S. 600 4

People v. Carr, (1914) 265 Ill. 220, 229 4

The R. S. Mabey, (1871) 80 U. S. (13 Wall.) 738 5

The Philadelphian, (C. C. A. 1st, 1894) 60 Fed. (2d) 423, 426 6

The Saunders, (C. C. S. D. N. Y. 1885) 23 Fed. 303 6

The William Bagaley, (1886) 72 U. S. (5 Wall.) 377, 412 6

Watts, Watts & Co., Ltd. v. Unione Austriaca, etc., (1918) 248 U. S. 9 ..... 4, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 896

AMOS G. McCAMPBELL, JR.,

Petitioner,

vs.

THE WARRICH CORPORATION AND ROBERT EIGER, DOING BUSINESS UNDER THE NAME AND STYLE OF EIGER REALTY COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SUGGESTIONS BY RESPONDENTS IN OPPOSITION TO MOTION OF PETITIONER FOR CERTIORARI TO SUPPLY OMISSIONS FROM RECORD, AND OPPOSING BRIEF TO BRIEF IN SUPPORT OF PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI AND IN SUPPORT OF MOTION TO SUPPLY OMISSIONS FROM THE RECORD.

SUMMARY OF ARGUMENT.

I. Petitioner is not entitled to introduce, for the first time, in this Court matter not in evidence in the *nisi prius* court. (*Infra*, page 3.)

II. Even if this evidence were now offered in the *nisi prius* court instead of in this Court of Appeal, as it is, it could still not be received even there, as no diligence is shown in not having discovered it in time to present it in the *nisi prius* court in proper time. (*Infra,* page 6.)

III. The alleged new evidence could not change the result. (*Infra,* page 7.)

IV. Counsel for petitioner persist in the erroneous position that the rule applicable here is that which obtains in the case of a remainderman who seeks to oust a disseisor. On the contrary, the rule applicable here is that which controls when an infant seeks to set aside a decree in a case to which he was a party. (*Infra,* page 7.)

V. Counsel for petitioner have still not shown a case of the type which the Supreme Court of the United States will entertain on petition for certiorari. (*Infra,* page 8.)

ARGUMENT.

Respondents respectfully suggest to the Court that the motion of petitioner, for certiorari to supply omissions from the record and for an order for further proof, should be denied, and in support of that contention respectfully submit to the Court the suggestions following, and the answers, also following, to the additional brief which petitioner now presents under the heading "Brief in Support of Petition for Rehearing of Petition for Writ of Certiorari and in Support of Motion to Supply Omissions from the Record."

I.

PETITIONER IS NOT ENTITLED TO INTRODUCE, FOR THE FIRST TIME, IN THE SUPREME COURT OF THE UNITED STATES, MATTER NOT IN EVIDENCE IN THE NISI PRIUS COURT.

The motion which petitioner now makes as a motion to supply "omissions from record" is incorrectly phrased. It is not a motion to supply omissions from the record. Instead, it is a motion to introduce in the Supreme Court of the United States, for the first time, evidence which petitioner failed to introduce before the *nisi prius* court. While the evidence thus sought to be introduced by him now for the first time in this Court, consists of records of a cause, they are not any part of the record of the cause as to which the petition for writ of certiorari has been filed. The records which petitioner seeks to bring before the Court are the records in a separate and independent cause, a foreclosure suit that was brought in the Circuit Court in which a final decree was entered in the year 1893. It is, therefore, plainly and simply an

effort to introduce new evidence in this Court. That that is not permissible must be apparent from the authorities which respondents cited on page 4 of the answer filed by them to petitioner's original petition for rehearing, to which these respondents respectfully direct the attention of the Court.

But petitioner now sets up various cases which he urges as requiring this Court to entertain evidence thus for the first time brought to the attention of any of the courts in this cause. However, the cases that he cites are not at all in point, and do not sustain his contention. The first of those cases, *Morgan* v. *Curtenius,* (1857) 60 U. S. (19 How.) 8, was one where a document which had in fact been introduced in evidence below had been omitted from the transcript which was brought to the court above. As shown above, that is not the case here. The next case petitioner cites, *Watts, Watts & Co.* v. *Unione Austriaca, etc.,* (1918) 248 U. S. 9, was one where this Court merely took judicial notice of the fact that the World War had commenced after the cause had been instituted below, the effect of which was to render one of the parties incapacitated from properly representing its case.

No such situation is presented in the case at bar. The District Court in this cause could have taken judicial notice of any papers in the same cause, but it could not take judicial notice of papers in another cause. *The People* v. *Carr,* (1914) 265 Ill. 220, at page 229, and the authorities there cited. If the District Court itself could not take judicial notice of any papers in another cause, even though that cause had been prosecuted before it, much less can the Court of Appeal take judicial notice of papers and records in another cause, as counsel for petitioner seek to have it do in this case.

The next case petitioner cites is *Patterson* v. *Alabama,* (1934) 294 U. S. 600, and it is similar in effect to the

case of *Watts, Watts & Co.* v. *Unione Austriaca, etc.*, (1918) 248 U. S. 9, just referred to. Petitioner omitted important language from the matter he quotes from *Patterson* case, thus:

> "We are not satisfied that the [State] court would have dealt with the case the same way if it had determined the constitutional question as we have determined it. * * * At least the state court should have an opportunity to examine its powers in the light of the situation which has now developed."

In other words, the change which the Supreme Court of the United States took notice of, was its own decision to the effect that the accused had been denied a constitutional right. That decision of the Supreme Court of the United States accomplished a change in the law subsequent to the time when the State Court had reacted to the case, of which the Supreme Court of the United States had notice and of which the State Court had no notice, and so the cause was returned to the State Court to react to the case in the light of the law which the Supreme Court of the United States had then just laid down. No such situation is presented in the case at bar.

The next case counsel for petitioner cite, *Camp* v. *Grass*, (1919) 250 U. S. 308, holds merely that the Conformity Act, requiring practice to be followed conformable to that in the State Court, does not apply to the Supreme Court of the United States. No contention is made here, either by petitioner or respondents, that raises any such question.

Finally, petitioner cites the case of *The Mabey*, (1871) 80 U. S. (13 Wall.) 738. This was an admiralty case, and counsel in citing it have quite overlooked, apparently, the peculiar rule that obtains in admiralty cases. For in an admiralty case the Court of Appeal treats the case as a new trial and, therefore, entertains new evidence and new pleadings where such are offered. *The Saun-*

ders, (1885) 23 Fed. 303; *The Philadelphian,* (1894) 60 Fed. 423, 426.

Even so, *The Mabey* case denied the application of the petitioner there to introduce new evidence for the first time in the Supreme Court of the United States, and it therefore holds contrary to what petitioner cites it for here. Indeed, that case cites the case of *The William Bagaley,* (1866) 72 U. S. (5 Wall.) 377, at page 412, in which this Court said:

> "Evidently the application in this case is in its nature original, and not appellate and it is well settled that this court has no original jurisdiction in prize causes. Such an application cannot be first presented in this court and allowed, because it would be assuming jurisdiction not granted either by the Constitution or the laws of Congress."

II.

PETITIONER HAS SHOWN NO DILIGENCE IN HIS FAILURE TO INTRODUCE SUCH EVIDENCE IN THE NISI PRIUS COURT.

Even if the alleged newly discovered evidence which petitioner now seeks to present for the first time in this Court, were being offered in the *nisi prius* court instead, it could still not be received because no diligence is shown to have been exercised by petitioner in attempting to discover it in time for presentation below in due season. According to his own showing, petitioner became diligent only after the Circuit Court of Appeals decided against him. Thereby, far from making any show of diligence, he shows positive negligence. *M'Leod* v. *City of New Albany,* (1895) 66 Fed. 378, 381, 382.

III.

THE ALLEGED NEW EVIDENCE COULD NOT CHANGE THE RESULT.

Furthermore, the evidence is merely cumulative. That the mortgage was made before instead of after the deed of 1866, as counsel now contend (see page 2 of "Brief in Support of Petition for Rehearing of Petition for Writ of Certiorari and in Support of Motion to Supply Omissions from the Record"), is quite immaterial. Indeed, in the original petition for rehearing, petitioner contended not only that the mortgage was made after the deed of 1866, but that the life tenants had joined in it; and petitioner made much of his contention that the life tenants had joined in the mortgage.

The further alleged new evidence, to the effect that the guardian ad litem had represented the life tenants before they sold their interests to Hyman, is also quite immaterial, as must appear from the top of page 18 of the brief which respondents filed opposing the original petition for a writ of certiorari, as there respondents point out that even if no guardian ad litem had been appointed at all, it would not change the situation.

IV.

THE RULES APPLICABLE TO THE TIME WITHIN WHICH A REMAINDERMAN MAY OUST A DISSEISOR DO NOT APPLY TO AN EFFORT BY A PARTY TO A SUIT, EVEN THOUGH AN INFANT, TO SET ASIDE THE DECREE ENTERED IN THAT SUIT.

Counsel in their latest brief (Brief in Support of Petition for Rehearing of Petition for Writ of Certiorari and in Support of Motion to Supply Omissions from the Record) persistently ignore, just as did the other counsel,

the situation presented by this cause. For, confronting the petitioner, is a decree of court entered October 2, 1893, in a cause in which the petitioner was concededly a party. The court will note that when respondents in their answer to the original brief filed by petitioner in support of the petition for certiorari called attention to the misstatement which petitioner made to the effect that the petitioner had not been a party to the old foreclosure suit, petitioner in his reply to respondents' answer, at the bottom of page 2 thereof, said:

> "The infant remaindermen were unquestionably before the court in the foreclosure proceedings * * *."

In such case the law which applies is that relative to the time when petitioner may come in to assail a decree, and not the law applicable to the time within which a person may eject or oust a disseisor who has dispossessed him. Respondents have cited ample authority bearing out this distinction (see pages 11 to 13 of respondents' "Brief Opposing Petition for Writ of Certiorari"), and the Circuit Court of Appeals has held accordingly. (C. C. A. 7th, 109 Fed. (2d) 115, at page 118.) Petitioner has not cited a single authority to the contrary.

V.

PETITIONER, EVEN WITH THE ALLEGED NEW EVIDENCE, HAS STILL NOT SHOWN A CASE OF THE TYPE WHICH THE SUPREME COURT OF THE UNITED STATES WILL ENTERTAIN ON PETITION FOR CERTIORARI.

The Court is respectfully directed to page 7 of respondents' "Brief Opposing Petition for Writ of Certiorari." It is respectfully submitted counsel for petitioner have failed utterly to answer the matters there appearing.

Conclusion.

Respondents respectfully refer again to the fact that this case involves a controversy that was disposed of 40 years ago, and that public policy dictates that there be an end of litigation sometime. (See page 5 of "Answer by Respondents to Petitioner's Petition for Rehearing on Denial of his Petition for Writ of Certiorari.") That time, it is submitted, has long passed.

Respectfully submitted,

Harold L. Reeve,
Elmer M. Leesman,
Attorneys for Respondents, The Warrich Corporation and The Eiger Realty Company,
69 West Washington Street,
Chicago, Illinois.